SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 467.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

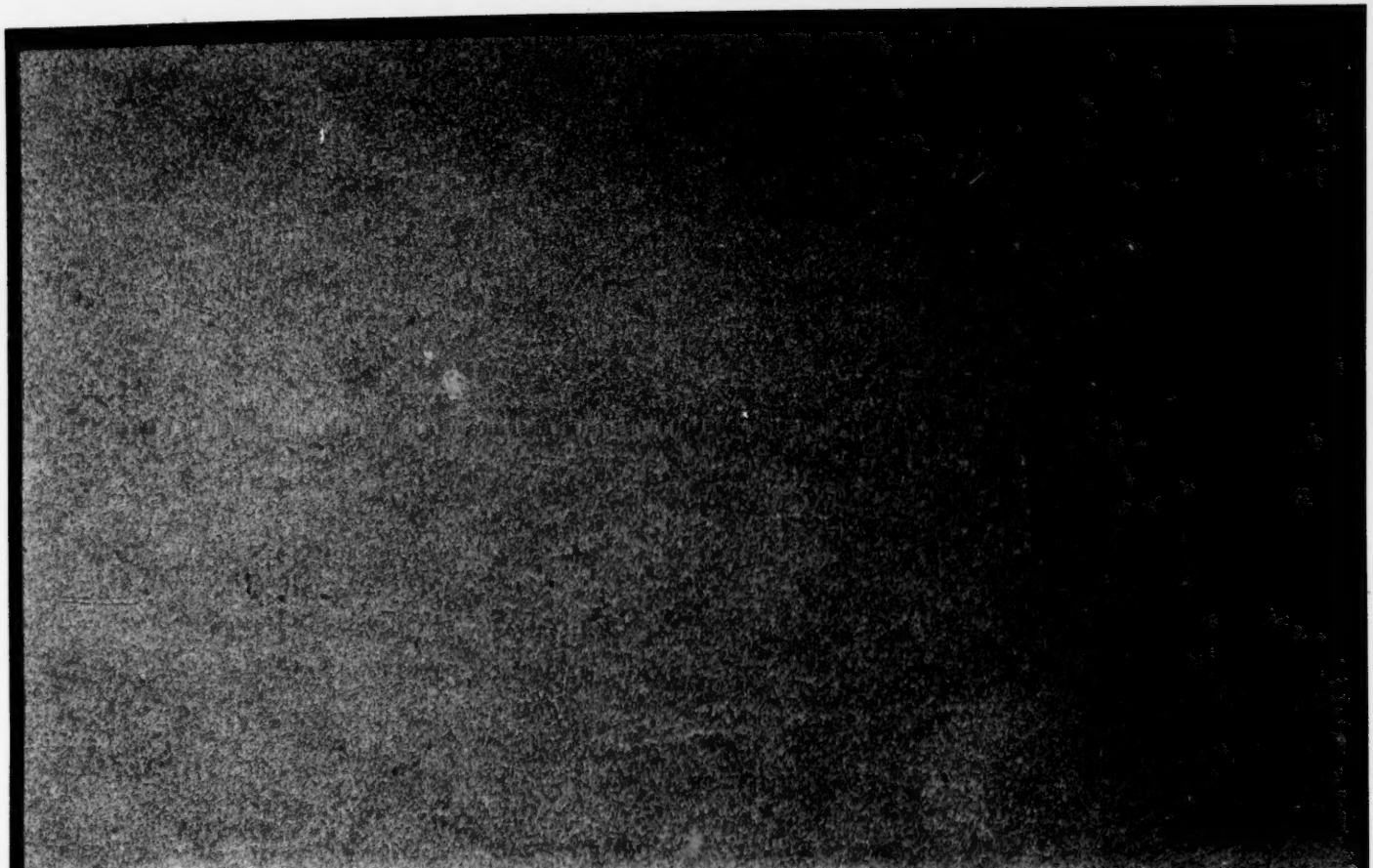
vs.

THOMAS TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 10, 1907.

(16,876.)



(18,579.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 351.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Thomas Tennessee was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term, 1901, thereof, between Thomas Tennessee, plaintiff, and The Choctaw, Oklahoma & Gulf Railroad Company is defendant, a manifest error hath happened, to the great damage of the said Choctaw, Oklahoma & Gulf Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the third day of August, 1901, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of June in the year of our Lord one thousand eight hundred and ninety-one. Issued at office in the City of Little Rock, with the seal of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, dated as aforesaid.

The Seal of the Circuit Court U. S. A., Western Division, of East. Dist. Ark.

W. P. FEILD.

Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.

Allowed by
JACOB TRIEBER,
U. S. District Judge.

Service of this writ acknowledged this 4th day of June, 1901.
BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Attys. for Plff. Thos. Tennessee.

Indorsed: Filed June 4, 1901, W. P. Feild, Clerk.

Return to Writ.

United States of America,
Western Division of the
Eastern District of Arkansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court U. S. A., Western Division, of East. Dist. Ark.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Little Rock, this second day of July, A. D. 1901.

W. P. FEILD,
Clerk of said Court.

2 Be it remembered, that on the 29th day of March, 1901, came into the office of the Clerk of the Circuit Court of the U. S. for the Western Division of the Eastern District of Arkansas the Choctaw, Oklahoma and Gulf Railroad Company, by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and filed therein its transcript [—] proceedings on removal from the Pulaski Circuit Court, Second Division, of Arkansas, in case of Thomas Tennessee vs. the Choctaw, Oklahoma and Gulf Railroad Company, which transcript of proceedings is in the words and figures following:

State of Arkansas,
County of Pulaski—ss.

Be it remembered that at a term of the Circuit Court for the second division of said county, begun and held at the court-house in the City of Little Rock, County and State aforesaid, on Monday, the 24th day of September, A. D. 1900, the same being the time and place prescribed by law for holding said Court, present and presiding the Hon. Joseph W. Martin, Judge of said Court, and Horace G. Dale, Clerk of said Court, and W. M. Kavanaugh, Sheriff of said County, being also present, Court was proclaimed in due form of law by said Sheriff when the following proceedings were had, to wit:

In the Pulaski Circuit Court, Second Division.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Complaint at Law.

3 Comes the plaintiff, Thomas Tennessee, by Blackwood & Williams, his attorneys, and for cause of action alleges:

That the Choctaw, Oklahoma and Gulf Railroad Company is a corporation duly incorporated under an Act of Congress of the U. S., with a line of railroad running from near Memphis, Tenn., southwesterly through the State of Arkansas, and through the town of Argenta, Arkansas.

That on the 6th day of February, 1900, the plaintiff was engaged as a brakeman on the freight train of the defendant, and was engaged in his duty as such in the town of Argenta, Arkansas, and as such was riding on the front end of the engine of freight train numbered thirteen (13), headed into the yards of said railroad.

That at the place where plaintiff was then engaged in the performance of his duty, there was a step on what is known as the "cow catcher" where plaintiff in the performance of his duty was accustomed to step. That in the performance of such duty he placed his foot upon said step, and the said step by reason of being in a weak or unstable condition gave way and thereby precipitated him on to the ground where he became entangled in the ties of said railroad company, and the said train ran over his left leg and bruised and mangled the same so that he was compelled to have it amputated near the body.

That the defendant was negligent in the construction of said step, and was negligent in permitting it to stay in a faulty and unfirm condition. That the condition of said step was unknown to this plaintiff.

That said railroad was operating said train over a track where the ties stood up some fifteen inches from the ground and thus made a man-trap into which plaintiff was thrown. That if said ties had been properly filled in when plaintiff fell onto the track of same he might have escaped uninjured, but by reason of the negligent construction of said track, plaintiff was caught in between the same and thereby suffered the loss

of his leg as aforesaid. That plaintiff was just beginning to run into the new yard and upon the new track, and its
4 dangerous condition was unknown to plaintiff.

That by reason of the negligence of the defendant, plaintiff suffered great bodily suffering, and severe mental anguish, and lost the use of his limb, to his damage in the sum of five thousand dollars ($5,000.00).

Wherefore, plaintiff prays judgment for $5,000, and for his costs.

BLACKWOOD & WILLIAMS,
Attys. for Pltff.

Filed and writ issued Aug. 14th, 1900.
H. G. DALE, Clerk.

Summons—Action by Ordinary Proceeding.

State of Arkansas,
County of Pulaski—ss.

The State of Arkansas to the Sheriff of Pulaski County:
You are commanded to summon Choctaw and Memphis Railroad Company to answer, within twenty days from the service of this writ, upon it, a complaint filed against it in the Circuit Court of said County by Thomas Tennessee, and warn it that upon its failure to answer, the complaint will be taken for confessed. And you will make due returns of this Summons within twenty days from the service hereof.

Witness my hand and the seal of said Court, this 14th day of Aug., 1900.
[Seal] H. G. DALE, Clerk.

State of Arkansas, County of Pulaski, ss. I have this 18th day of August, 1900, duly served the within by delivering a copy of the same to W. B. Smith, secretary of the within named Choctaw & Memphis R. R. Co. in said County as therein commanded, Service 50, Mileage 10, Return 60. W. M. Kavanaugh, Sheriff, Eugene Jabine, Deputy Sheriff. Returned and filed this 6th Sept. 1900. H. G. Dale, clerk. Blackwood & Williams, Attorneys.

On October 12th, 1900, a day of said Court, the following proceedings were had:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes said defendant by its attorney, Thomas Buz-
5 bee, and by leave of Court files herein its petition and bond for the removal of this cause to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

In the Pulaski Circuit Court.

Thomas Tennessee, Plaintiff,

vs.

Choctow, Oklahoma & Gulf Railroad Company, Defendant.

Petition for Removal.

To the Honorable Joseph W. Martin, Judge of the Circuit Court of Pulaski County, Arkansas:

Your petitioner respectfully shows that it is the defendant in the above-entitled suit, and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

That your petitioner was, at the time of the bringing of this suit, and still is, a corporation organized under an act of congress of the United tSates, entitled "An Act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company," which was approved August 24th, 1894, and that the plaintiff was then, and still is, a citizen of the State of Arkansas.

That said suit is of a civil nature, the same being an action at law by the plaintiff to recover against this defendant for injuries alleged to have been caused to plaintiff by the negligence of the defendant in operating a railroad alleged to have been owned by it.

That the said suit is one arising under the laws of the United States in this, to-wit: That this defendant is a corporation organized and incorporated under the provisions of an act of the congress of the United States, entitled "An act to authorize the purchase of the property and franchises of the
6 Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company," which was passed by the Congress of the United States and approved on the 24th day of August, 1894, and under the provisions of which Act of Congress defendant maintains its corporate capacity and carries on business as a railroad company.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said court of the United States for the Western Division of the Eastern District of Arkansas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to said circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the Western Division of the Eastern District of Arkansas, and it will ever pray.

J. W. McLOUD,
E. B. PEIRCE and
THOS. S. BUZBEE,
Attorneys for Petitioner.

Bond for Removal.

Know all Men by These Presents:

That the Choctaw, Oklahoma and Gulf Railroad Company, as principal, and J. J. Mandlebaum as sureties, are held and firmly bound unto Thomas Tennessee in the penal sum of Five Hundred Dollars, for the payment whereof, well and truly to be made unto the said Thomas Tennessee, his successors and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents; yet, upon these conditions:

The said Choctaw, Oklahoma and Gulf Railroad Company, having petitioned the Circuit Court of Pulaski County, Arkansas, for the removal of a certain cause therein pending wherein
Thomas Tennessee is plaintiff and the Choctaw, Okla-
7 homa and Gulf Railroad Company is defendant, to the
Circuit Court of the United States in and for the Western Division of the Eastern District of Arkansas:

Now, if the said Choctaw, Oklahoma and Gulf Railroad Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, in full force and virtue.

Witness our hands and seals, this 12th day of October, 1900.

CHOCTAW, OKLAHOMA and GULF R. R. CO., Principal,
By THOS. S. BUZBEE, Atty.
JAS. J. MANDLEBAUM, Sureties.

Filed Oct. 12th, 1900. H. G. Dale, Clerk. By J. J. McEvoy, D C.

On October 31st, 1900, a day of said Court, the following proceedings were had:

Thomas Tennessee, Plaintiff,
vs.
Choctaw & Memphis Railroad Company, Defendant.

Comes said defendant, by its attorney E. B. Peirce, and the petition and bond of said defendant for the removal of this cause to the United States Court, heretofore filed, now coming on to be heard, and it appearing that said bond is in due form, conditioned as required by law and that the surety thereon is good and sufficient, the same is therefore approved and it is considered and ordered by the Court that the prayer of petitioner be granted and that this cause be removed for trial to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, and the Clerk
8 of this Court is directed to make out and transmit to said Court a true and complete transcript of the record and proceedings of this Court in this cause.

State of Arkansas,
County of Pulaski.

I, J. J. McEvoy, Clerk of the Circuit Court in and for said County, do hereby certify that the above page, and eight (8) preceding pages, contain a true, complete and perfect transcript of the record entries and pleadings in the case of Thomas Tennessee vs. Choctaw and Memphis Railroad Co. as the same now appear of record and on file in my office.

Witness my hand and official seal, this 12th day of December 1900.

[Seal] (Ten cent revenue stamp)

J. J. McEVOY, Clerk.

Fee Bill.

H. G. Dale, Clerk, (Pd. by plf. $2.50)	$3.65
J. J. McEvoy, Clerk, (Transcript)	3.60
W. M. Kavanaugh, Sheriff, (Pd. by plf.)	.60

Transcript filed March 29, 1901. W. P. Feild, Clerk.

9 United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 22nd day of October Anno Domini, One Thousand, Nine Hundred at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber District Judge presiding and holding said Court, the following proceedings were had, to wit: on March 29th 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the defendant by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and files its motion to require plaintiff to strike certain parts of his complaint herein.

Which motion to strike is as follows:

In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.
April Term, 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Motion to Strike.

Comes the defendant, and moves the Court to require plaintiff to strike from his complaint the following sentence: "That soon afterwards said track was properly filled in and said step was taken off and replaced by a good and proper one," and for cause says, that said allegation is irrelevant and immaterial, and not pertinent to the issues in this cause.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant.

Filed March 29th, 1901. W. P. Feild, Clerk.

United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the first day of April, Anno Domini, One Thousand Nine Hundred and One at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber District Judge presiding and holding said Court, the following proceedings were had, to wit: on April 4, 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams, Esqs., his attorneys, and the defendant by E. B. Peirce, Esq., its attorney, and the motion of said defendant heretofore filed herein to require plaintiff to strike certain parts from his

complaint is by leave of court withdrawn, and by agreement of parties this cause is set down for trial on Friday, April 12, 1901.

And on April 5, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the defendant by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and by leave of court files herein its answer.

11 Which answer is in the words and figures following, to wit:

In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.
April Term, 1901.

Thomas Tennesee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Answer of Defendant.

Comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company, and for answer to the complaint of the plaintiff herein, says:

That it is not true that the Choctaw, Oklahoma and Gulf Railroad Company is a corporation duly organized under the laws of the State of Arkansas, but states the fact to be that it is a corporation organized under an act of the Congress of the United States.

Defendant further answering says, that it is not true that plaintiff was riding on the front end of the engine of freight train No. 13, headed into the yards of said railroad, but alleges the fact to be that plaintiff was attempting to step upon the front end of said engine; and that the act of attempting to ride upon said front of said engine was unnecessary, careless and improper on the part of the said plaintiff; and, in the discharge of his duty, he was not required, nor was it necessary for him to attempt to so ride; and in attempting to do so he was violating the rules of said defendant company.

Defendant further answering, states, that it is true that there was a step on what is known as the "cow catcher", but denies that plaintiff, in the performance of his duty, was accustomed to ride or step thereon.

Defendant denies that plaintiff was in the performance of his duty on the particular occasion referred to in his complaint, in attempting to place his foot upon said step; and denies that said step was in a weak and unstable condition and gave way and thereby precipitated him to the ground,
12 whereby he became entangled in the ties of the said railroad company; and denies that the condition of the step had anything to do with the precipitation of said plaintiff to the ground, which resulted in the injury of which plaintiff complains.

Defendant denies that it was negligent in the construction of said step, and denies that it permitted said step to remain in a faulty and unfirm condition, and denies that it was guilty of any negligence whatever in permitting it to remain in a faulty and unfirm condition.

Defendant denies that the condition of said step was unknown to plaintiff.

Defendant further answering states, that it is true that it was operating said train over a track where the ties stood up about six inches from the ground, but denies that the same stood up fifteen inches from the ground and made a man-trap into which plaintiff was thrown. It denies that if the said ties had been filled in when plaintiff fell into the track that he might have escaped injury. It denies that by reason of the condition of said track plaintiff was caught in between the same and thereby suffered the loss of his leg.

Defendant denies that plaintiff was just beginning to run into the new yards and upon the new track, and denies that its dangerous condition was unknown to plaintiff, and denies that the alleged condition of the ties in the track had anything whatever to do with plaintiff's alleged injury.

Defendant further answering says, that if plaintiff was injured as alleged in his complaint, the said injury was caused by his own carelessness and negligence, and without any fault on the part of this defendant.

Wherefore, defendant, having fully answered, prays to be dismissed with its costs.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant.

Filed April 5, 1901. W. P. Feild, Clerk.

13 And on April 12, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and the parties announcing themselves ready for trial a jury came, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, being twelve good and lawful men of the district, who were duly tried empanelled and sworn well and truly to try the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence, thereupon the jury proceeded to hear the evidence as well on the part of the plaintiff as of the defendant, and the trial hereof not being concluded, the same is continued until to-morrow morning at half past nine o'clock.

And on April 13, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and come the jury, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, and
14 the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence and argument of counsel and having been charged and instructed by the Court, retire to consider their verdict.

Which charge of Court to jury is as follows:

Gentlemen of the Jury: In this action, which has been brought by the plaintiff against the defendant to recover $5 000 for injuries received by him while he was in the employ or service of the defendant company and which resulted in the loss of his leg, the claim for damages made by the plaintiff is based upon two distinct causes or acts of negligence on the part of the railroad company.

It is claimed, first, that the company was guilty of negligence in having the step or plate in front of the pilot of the engine insecurely fastened, so that when this plaintiff, in the discharge of his duty, stepped upon it, while the train was in motion, it gave way, precipitating him to the ground, and by reason whereof he lost his leg and suffered the injury for which he has now instituted suit.

Secondly, it is claimed that the company was guilty of negligence also in keeping the track going into the yard and on which this accident occurred in a condition whereby this accident was in part caused. The specific ground is that between the ties the track was not filled up, so that when this man fell his foot was caught in it, and on account of the deep depression between the two ties he could not extricate his foot, and but for that fact he would not have lost his leg and sustained the injury for which he now sues.

These are the two grounds of negligence which are charged against the railroad.

The railroad company denies, first, that the step was not properly fastened. They say that the step or plate was properly fastened, and that in any event, so far as this plaintiff is concerned, he had no business on the plate.

They also deny that they were guilty of any negli-
15 gence in keeping the track in the condition which it is shown to have been in, that is, that the ties were lying upon the ground and the space between the cross-ties was not filled in.

They deny that under the conditions then existing, that was negligence; and they have set up as a further defense contributory negligence on the part of the plaintiff, or in other words, they say that even if it be true that the railroad company was guilty of negligence yet this accident would not have happened but for the fact that the plaintiff himself was guilty of contributory negligence, that is, such negligence which made this accident possible.

And they set up as a cause of this plea the fact that he had no business, while the train was in motion, to attempt to board the engine on that little narrow step in front of the engine attached to the pilot, and if he did so he did it at his own peril and at his own risk, and if by reason of stepping on it he suffered any injury, the company is not liable.

Now, I want to explain to you as briefly as possible the law which is applicable to the issues which are involved. I want to state to you at the outset, gentlemen of the jury, that under

our system of jurisprudence a jury is as much a part of the court as the judge is. The law divides their duties by confining to the judge exclusively the determination of all questions of law. It is the duty of the judge to tell the jury what the law is, so far as it is applicable to the case.

On the other hand, the determination of all the facts in the case is left exclusively to the jury. Your duties and your prerogatives in determining the facts are just as great as those of the Court are in determining what the law is.

If at any time in my charge to you I allude to some of the testimony which has been introduced here, I want you to remember that while I shall try not to express any opinion as to what your finding should be, yet if I should say something that might lead some of you to believe that I have a fixed opinion as to what your verdict should be or what your find-
16 ings of the facts should be, I want to say to you now in advance that you are mistaken, and to any opinion which I may express on the facts you are to pay no attention, because it is you and you alone who must determine the facts and you must do it in accordance with the dictates of your conscience and in conformity with your oath to render a true and correct verdict according to the law and the evidence in the case.

The Court has no power to interfere with you in the determination of any of the facts, and you do not have a right to interfere with the Court in determining what the law is.

Now, I will call your attention to the law in the case.

The duties which a railroad company, or any other employer, because there is no difference between a railway company and any other employer, owes to its employes are quite different from those which it owes to its passengers.

What it owes to its employes is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident.

You are, therefore, to determine from the evidence the first question raised by the plaintiff,—whether the step or plate in front of the engine and attached to the pilot, on which plaintiff tried to step at the time of the accident, was, by reason of the defendant's negligence, insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was in-

jured as alleged while trying to get on the step in the proper discharge of his duties as a brakeman. That is the first question for you to determine, "was that plate fastened securely or not?"

If you find from the evidence that it was properly fastened, then you need pay no more attention to that particular part of the case.

But, on the other hand, if you find that it was not properly fastened, then there are other questions to be considered by you in connection with the matter.

17 The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

If under the rules either as communicated to him or as he should have known them by the exercise of due diligence he was not permitted to get on there, yet in violation of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving way and he cannot recover.

But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by reason of having done so, then he cannot recover.

Now, as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in a reasonably safe condition and by reason of that failure the plaintiff by no negligence of his own, sustained the injury, complained of, then it is liable; provided also that the plaintiff, at the time of the accident, did not know, or by the exercise of reasonable diligence could not have known, the condition of the track, but if he knew the condition of the track or could have known it by the exercise of reasonable diligence, and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover.

Now, as to the duty of providing a reasonably safe place for the servant's work, the Court instructs you that when a place is in such condition as similar places under like conditions

are usually kept by well-managed railroad corporations,
18 then the company has fully discharged its duty towards its employes and is not liable for injuries sustained by its servants, for the law conclusively presumes that when a man accepts employment which is of a dangerous nature, such as railroading, he is willing to assume the risks incident to his employment and will be entitled to no damages for injuries sustained in such employment, unless it is shown by the evidence that the employer or master was guilty of negligence by failing to provide such a safe place for the servant to perform his duties as under like conditions others engaged in the same business are in the habit of furnishing.

Now, in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company was guilty of negligence in allowing, at that time and that place, the track to remain with the spaces between the cross ties unfilled, whereby its servants or employes might get their foot caught and perhaps get injured.

Now, in determining what would constitute negligence so far as this case is concerned, you are to take into consideration the place where this accident occurred. The evidence tends to show that the place where this injury occurred was the railroad yard.

Now, as a general rule, where the tracks are in large railroad yards where there is a great deal of traffic going on and where a great many employes walk to and fro in crossing the tracks, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them.

But, on the other hand, you are also to consider the fact that these yards had but recently been made, and you are to determine from the evidence that has been introduced, giving due weight to the testimony of each witness who has testified, considering for the purpose of determining the weight to be given to his evidence, his knowledge, his interest in the matter, and his experience.

Now, after you do all that, then you are to determine from
that evidence whether, in view of the fact that this
19 yard had but recently been made, it was proper or improper to leave it in the condition the evidence shows it was in.

It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence,

not extraordinary but ordinary diligence, to have filled up this track—the spaces between the cross-ties—before the time when this accident occurred on the night of February 5th, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that the road bed might settle and the yards be drained, as was testified to by one of the witnesses.

Now, as I stated to you before, gentlemen of the jury, in determining what weight should be given to the testimony of each witness, you are the sole judges of it, but I want to say to you and I am simply expressing my own opinion that you should consider a man's experience, his interest in the matter, and where a man has been superintendent, and engaged in making yards, planning them and laying them out, his testimony is entitled to much greater weight, in my opinion, than a man who simply worked as a common laborer, or even a section boss or a boss over a few men.

But then, as I stated to you before, you are the sole judges of the credibility of each witness and it is for you to determine which of the witnesses is entitled, where there is a conflict in their evidence, to be believed.

Now, you are also to take into consideration whether it is usual and proper for a well-managed railroad, when a new yard is laid out and has just been completed, to permit the spaces in between the cross-ties to remain open for several months, and whether it is usual to have freight trains running over the tracks into the yard in the condition that this track was at the time this accident occurred.

Now, the knowledge, on the part of the plaintiff of
20 the condition of the tracks as well as of the machinery is very important, for if an employe has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is not the kind of danger that I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

Now, if he sees that the place is dangerous and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having it not filled up, for the servant has a right

to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the fact, then he must do so at his peril.

Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or step as the evidence shows it was in or not.

If he did not know it, and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own expreience told him he should not get on and when there was other provision made for a man to get on a train while it was moving, then, gentlemen of the jury, he cannot recover.

21 And I want to say to you that a mere custom does not justify a person boarding a moving train where it is dangerous to do so; his duty is to signal the train to stop if it is necessary for him to get on, and if he is injured by reason of trying to get on a train while in motion, and it is seen to be dangerous, he cannot recover, the law being that although the negligence of the railroad company may be the principal cause of a man's injury, yet if he was careless himself, if the want of attention to his own safety contributed in any considerable degree to his injury, the railroad company is not liable.

An employe cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose commands he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad and he fell and was injured and the injury was caused by the fact that the track had not been filled up between the

cross-ties, and you further find that under the evidence and the law as I explained it to you a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover.

But, on the other hand, if he had no business to get on that plate, but his duty was to jump on the back step, or the step back of the engine which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not; if that was the proximate cause of the injury he received, he cannot recover.

If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he
22 knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact that it was a new track, then the plaintiff cannot recover.

Now, in determining whether this plate was intended to be used as a step to get on when the train is in motion, you must consider the fact that this step was but a narrow strip, that to stand on it a man's foot must be sidewise; while, on the other hand, switch-engines which run both backwards and forwards have a regular step wide enough for a man to step on, thus showing that apparently there is a distinction made by railroads between the ordinary freight engine and the switch engine. And it is claimed by the defendant in this case that there is a difference in the duties of the employes on trains drawn by these respective engines.

I do not know that there has been any evidence introduced on that point, gentlemen of the jury, but I want to say to you that if any evidence has been introduced tending to show that subsequent to the date of the injury the defendant either removed the plate or step from the pilot of the engine or filled in the spaces between the cross-ties, such evidence is not to be considered by you in this case as evidence that it should have been made prior thereto.

Now, gentlemen of the jury, if your verdict is for the defendant, that is, if you believe under the charge of the Court and the evidence that has been submitted to you that your verdict should be for the defendant, then you will simply say, "We, the jury, find for the defendant," and you need not consider anything further in this case.

But if you think and your verdict is that the plaintiff is entitled to recover a judgment, then, gentlemen of the jury,

the next duty you have to perform is to assess the damages; that is, you must determine what damages should be awarded to the plaintiff against the defendant by reason of the
23 injury sustained by him in this accident, if the defendant is liable.

I will state what you are to consider in assessing these damages.

He is entitled to the expenses incurred by him in seeking to get cured; that is, money expended for medical attendance and drug bills during that time.

He is entitled to damages for his loss of time. If, on account of the accident, he was unable to perform any work, the time he could do nothing he is entitled to be compensated for. He is entitled for what you think will compensate him for the difference in what he could have earned if this accident had not occurred and what he can earn by reason of having lost his leg. The difference between these two sums he is entitled to, taking into consideration what you believe his time is worth.

In determining the difference in wages which he may earn hereafter, evidence has been introduced to show what, according to the life tables, the probabilities are as to the duration of his life hereafter. I believe the evidence introduced tended to show what his age was at the time the injury took place and the probabilities of living are 33 years and a fraction over, 33 9-10 years. Now, of course, it might be less.

Now, gentlemen of the jury, I want to say to you that these tables are not conclusive on you, because you know that no one can say that a man is going to live a certain number of years. These tables are based upon averages and the experience of men who have devoted their time to it and are thoroughly conversant in the science of making up these tables. This is a matter for you to consider, but it is for you finally, gentlemen of the jury, to determine what you think the probabilities of his life are, that is, how long he may live.

These are damages that can be calculated by you with mathematical precision. You can take a piece of paper and a pencil and set down the proof showing that there was so much paid out for medicine and doctor's bills, I believe he testified $100.00. There was evidence tending to show
24 that he was earning $65.00 per month and that he has been out so many months without doing anything, so you can figure that time at $65.00 a month.

You may also figure about how long he is going to live and what he is likely to earn and what he would have earned if he had not been injured.

But now there is one other matter of damages which is to be considered by you about which the court nor anyone else can help you and that is the damages that the law allows to parties that have been injured and suffered great pain, the damages allowed for the pain and suffering, both mentally and bodily.

That is a matter, gentlemen of the jury, that you must use your own judgment about, taking into consideration a man's condition in life, his station in life, his occupation and all these matters, and then determining what, if he is entitled to any, damages would be a reasonable compensation for the pain which naturally a man must suffer both mentally and physically if he is injured as this man has been.

But, of course, gentlemen of the jury, in assessing this damage, you must be guided by the same rules as you will be guided in weighing other testimony, and that is this, to have no bias or prejudice for or against either party to this action.

The fact that this man is a helpless cripple and the other party is a railroad is a question that must not in any way influence you when you render your verdict.

The question which you are to decide, gentlemen of the jury, is simply, not what you would like to see done but what ought to be done according to the oath which you have taken; and whatever your conscience tells you you ought to do, do that and your verdict will be right.

I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employes, otherwise it is liable.

Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant and was found to be in perfect condition, then if within a short time before the accident occurred—if after it left, say some central place, Forrest City or Brinkley, on its road for some reason—or a short time before it reached here, something unknown or unforseen caused it to become loose, then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order.

Now, then, that you are to consider.

If you find that it has exercised due diligence such as any ordinarily reasonable man would exercise in matters of that kind, then they would not be liable.

But, on the other hand, if they had not and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer if its servants' or employes' safety, regardless of his own diligence.

All it undertakes to do is to keep the machinery and its right of way and place where they work in good and proper order and use such diligence as a prudent and careful man would use. And the company is not liable for any defect of which an employe has knowledge at the time.

You may now retire and consider of your verdict.

Filed April 13, 1901. W. P. Feild, Clerk.

And on April 15, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and
26 Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and come the jury, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, and return into court the following verdict, "We, the jury find for the plaintiff and assess his damages at $5,000. (Signed) Edgar A. Nickels, Foreman. 13th of April, 1901."

It is therefore considered, ordered and adjudged that said plaintiff, Thomas Tennessee, do have and recover of and from said defendant, the Choctaw, Oklahoma & Gulf Railroad Company, the said sum of five thousand dollars ($5,000,00), assessed as aforesaid, for his damages, together with all his costs herein expended, and have execution therefor.

And on June 4, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Now, on this day comes the plaintiff by Joseph W. House, and Blackwood & Williams, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and said defendant by its said attorney presents here its bill of exceptions, and the same being examined by the Court and found correct is signed by the judge thereof and ordered to be made a part of the record in this cause; and said defendant also files its assignment of errors and presents its petition for a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, which is granted by the judge and citations to the plaintiff signed by the judge.

And it is further ordered by the Court that upon the execution of a bond with good and sufficient sureties by the defendant in the sum of $6,000, conditioned as required by law, and
when approved by the judge of this court, the same
27 shall act as a supersedeas on the judgment rendered herein.

And thereupon said defendant presents its bond in the sum of six thousand dollars, which is approved by the judge of this court, and it is ordered that the judgment herein shall be superseded.

(Signed) JACOB TRIEBER, Judge.

Which bill of exceptions is in the words and figures following:

28 In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Bill of Exceptions.

This cause coming on for trial on the 12th day of April, 1901, the plaintiff, to sustain the issues on his part, introduced the following testimony, to wit:

Wesley Graves, (colored) being duly sworn, on behalf of the plaintiff testified as follows:

Direct Examination.

Q. What is your name? A. Wesley Graves.
Q. How long have you known the plaintiff here?
A. Well, I guess about six years.

Q. Did you know him last February? A. Yes sir.
Q. Do you know what business he was engaged in?
A. He was brakeman on the C. O. & G.
Q. What business were you engaged in?
A. I was brakeman for the same company.
Q. Were you brakeman on the occasion he got hurt over there? A. Yes sir.
Q. Did you see him get hurt?
A. I didn't see him when he got hurt, but I went over there in about twenty minutes.
Q. Where was he when you saw him?
A. He was laying in the caboose.
Q. About what time of night?
A. I disremember what time of night.
29 Q. Well, was it before midnight?
A. I think it was.
Q. What was his condition then?
A. He was laying in the caboose and his left leg was all mashed up right along by his knee and the toe of his shoe.
Q. Had his leg been cut off then? A. No sir.
Q. Were you present when it was cut off? A. No sir.
Q. How long did you stay with him?
A. I think I stayed with him until they brought him over on this side of the river.
Q. You say his leg was all mashed up? A. Yes sir.
Q. Was he conscious? A. Yes sir, he knowed me.
Q. Did you see the engine he was run over by?
A. Yes sir.
Q. What engine was that? A. C. O. & G. engine No. 5.
Q. How long had you known that engine?
A. I don't exactly remember when she come down. She come down from the west end. I have been around her ever since she come down, I think it was a little before Christmas.
Q. What make was it? A. Rhode Island.
Q. How large was that engine?
A. It was quite a large engine, about an 18-inch.
Q. Did you ever run with that engine? A. Yes sir.
Q. Did you ever make a trip with it?
A. Yes sir, made a trip with her three or four days before that happened.
30 Q. Do you know where this step is? I mean where it is put on to the engine? A. Yes, sir.
Q. Describe to the jury where this step was.
A. It is bolted on to the bottom of the pilot, sometimes called the cow catcher, about 6 or 8 inches from the point of the pilot. It is wide enough for a man's foot to slip in, and there is a groove on the outside to keep a man's foot from slipping. It is bolted under the pilot.

Q. What kind of material was that step made of?
A. It's iron, sheet iron.
Q. Where is it bolted?
A. It's bolted right under the pilot.
Q. Is it bolted to the metal part of the pilot?
A. No, sir, it's bolted to wood.
Q. Do you know anything about the condition of that step before this accident occurred?

(Counsel for defendant objects.)

Q. Immediately before this accident, or when the accident occurred, can you say what condition it was in about that time?

(Counsel for defendant objects.)

Court: Do you know what condition it was in immediately afterwards?
A. I couldn't say what condition it was in.
Court: Do you know what its condition was a short time afterwards?
A. A short time afterwards it wasn't there.

(Counsel for defendant objects.)

Court: Then you do not know the condition of the step at the time of the accident?
A. I couldn't say what condition it was in.

Mr. Blackwood:
Q. Did you see it early next morning?
31 A. Early next morning I went down and looked at the engine and, the piece had been removed.

(The defendants objected to each of the above questions and answers relative to condition of step after accident and asked that the same be excluded from the jury because the answer was incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. When was the last time you saw it before you saw it that night?
A. It was the last trip that I made with the engine.
Q. How long was that before this accident?
A. I don't think it was more than three or four days.

32 Thomas Tennessee, (colored) plaintiff, being duly sworn, on his own behalf testified as follows:

Direct Examination.

Q. Your name is Thomas Tennessee? A. Yes, sir.
Q. How old are you, Thomas?

A. Thirty-three years old.

Q. How long have you been railroading?

A. About 12 or 15 years.

Q. In what capacity? A. Brakeman and switchman.

Q. How many roads have you worked for?

A. I have worked for 17 or 18 different roads.

Q. Did you ever work for any roads in the State of Arkansas? A. Yes, sir.

Q. What ones? A. The Iron Mountain and Choctaw.

Q. How long had you been at work for the Choctaw at the time you were hurt?

A. I went to work in December and worked a part of December and laid off in January. I got my foot hurt and laid off in January and then didn't go back any more until the 5th of February.

Q. Where did you run in December?

A. A part of the time I run from Brinkley to Memphis, and then when they run the first schedule in from Memphis I come through on the first train.

Q. When was that?

A. In December, the 13th or 14th of December.

Q. Where did you run from then on to the first of January or February? A. We run from here to Memphis and back.

Q. What track did you run in on?

A. We always generally come down the old main
33 line. They didn't have the new yards fixed then. Later on I headed into the new yards about once before I laid off.

Q. This jury probably do not know where the old main line was? Where did it go, down into Argenta?

A. Yes, sir, it come right straight down into Argenta.

Q. Where did the main line afterwards run?

A. The main line still run down that way but they put in a lead, and there are seven or eight tracks in between the lead and the main track. When the new depot was finished, the main afterwards turned and went across the bridge, and this lead line was the old main line.

Q. You commenced, you say, about the middle of December to come into Little Rock. How many trips did you make before you laid off?

A. I made one pretty near every day up until the time I laid off.

Q. What were you running on?

A. I was running on a freight.

Q. What time did it get in here?

A. Well, we generally got here about 9:30 or 10 o'clock. Sometimes in the morning we got in on time, at 6:10.

Q. Was that before day? A. It was about daylight.
Q. When did you generally get out?
A. Generally about 6:40 the next morning.
Q. Was that daylight?
A. Yes, sir, just about daylight, but we had to use lanterns.
Q. And you continued to run on that line until when?
A. Well, we run in on the old main line until about Christmas. I went out Christmas eve morning and went to Memphis and didn't get out of Memphis no more until about the 27th. When we come back from Memphis we come into the new yards. I come down the main line and the yardmaster told me to back up and head into the new yards, and I headed into the new yards.

Mr. Peirce:
Q. That was when you were going to Memphis?
A. No, sir, coming this way.
34 Q. Did you make any more trips?
A. No sir, I laid off.
Q. Did you lay off during January?
A. Yes sir, didn't work at all.
Q. And you laid off, were you discharged?
A. No sir, I laid off myself, I got my toe cut and laid off.

Mr. Blackwood:
Q. When did you return to your job again?
A. I returned to work on the 4th or 5th, I think it was the 5th, of February.
Q. Where did you go when you came back to work?
A. We went over to Memphis.
Q. When did you get back?
A. We left here Monday morning, and started back Tuesday morning and got here about 10 o'clock that night.
Q. Where did you start from on that trip?
A. We started from Hopefield when we started back this way.
Q. Where did you start from going to Memphis?
A. We left from the new yard, we picked up our train around on the lead, I think it was track No. 8.
Q. What time did you leave?
A. We left here that morning about 7 o'clock, it may be a little after, about 7:40; we had to back over to the depot over the bridge before leaving.
Q. Did you start from the depot on this side? A. Yes sir.
Q. What time did you start over there at the yards to come over this way?
A. I don't know exactly, I think it was about 7:40. We had to go and get a caboose and go across the river to the de-

pot and see if there were any passengers, and we would stay over there about 15 or 20 minutes, and then come back on this side of the river and leave the caboose on the main line and pick up our train.

35 Q. What time did you pull out of the new yards over there that morning? A. About 8 o'clock.

Q. What time did you leave from the Little Rock side?

A. About 7:10.

Q. Then you came over—got your train and came across?

A. No sir, we went across with the engine and caboose then came back and picked up our train on the Argenta side, and goes to Memphis.

Q. You went over to Memphis and came back?

A. Yes sir.

Q. You got back here about what time?

A. About 10 o'clock at night.

Q. That was the 6th of February, last year?

A. Yes sir.

Q. Just tell the jury what happened when you got to the yards.

A. Coming in, I rid out from Carlisle—from Lonoke—I rid out from Lonoke and I picked up a fellow and he rode with me into the yards here. I was sitting on the side of the train talking to him, and when we come into the yards I goes down to the engine. I jumps on the tank of the engine and goes on down into the engine. I gets down and throws the main line switch, and my lamp went out. I came back to the train and lit it, and goes on down and throws another switch and then walks on about 60 feet further and throws another switch. After that I undertook to get on the engine, at least, I did get on the engine, on the pilot, to ride on down to the lower end of the yards to see if the switches were all lined up. When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go.

36 Q. How was your foot caught?

A. My foot got hung between the ties, between the bottom of the ties, and held it fast. When my foot went down I couldn't get it out.

Q. Then the condition of the ties is what made the accident possible? A. I couldn't get my foot out.

Q. Explain to the jury how those ties are fixed.

A. The ties were laid up on top of the ground and I suppose it was about 8 or 10 inches, probably more than that, from the top of the ties to the ground. When my foot went down I pulled my leg with all my might and couldn't get it out. I pulled all the toe of my shoe off, and bent the instep of my shoe back. I pulled with all my might, but I seen that I couldn't get it out and just give up and let it go.

Q. What was the result?

A. Well, the engine run over me when I fell, run over my leg. I hallooed as loud as I could to make the engineer hear me, but he didn't see me. But he must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could.

Q. How fast were they running?

A. They were running about four miles an hour.

Q. Is that slow or fast? A. That's very slow.

Q. When you got your foot caught under there, the train ran over you and mashed your leg?

A. Yes sir, mashed it all to pieces.

Q. Broke the bone?

A. Yes sir, broke the bone, mashed my knee cap all to pieces.

Q. Try as you might you could not get it out? A. No sir.

Q. Was the hurt painful? A. Yes sir, it was.

Q. Just tell the jury whether you suffered any or not?

37

A. Why, I suffered just as near death as any man could suffer death and not die. It wouldn't have been as hard to die.

Q. Did you lose consciousness?

A. No sir, I was perfectly conscious all the time.

Q. How long were you left there on the ground?

A. I lay there about an hour I reckon. I lay there and begged them to send for a doctor. I told them to send for some doctor and let him put morphine or chloroform or something on my leg.

Q. What was done with you?

A. After I lay there about an hour, or longer I suppose, an engine from the west then pulled down into the yards and they took the engine off the other train and picked up our caboose and pulled down to where I was laying on the ground. Then they stopped awhile and said they didn't know how they would get me into the caboose. I told them if they would get close to me and help me I could pull up into there. Then a

man got on each side of me and I put my arms around them and raised myself up into the caboose, I put my hand on the step of the caboose and eased myself back and laid down.

Q. Where did they take you then?

A. I was brought to the Choctaw depot where an ambulance met me and I was taken out to Second and Center to the Little Rock infirmary.

Q. Was your leg amputated then?

A. No sir, they carried me into the house out through one room and out into another room and one of the sisters suggested that they would have to carry me upstairs. They put me on a cot and took me upstairs. I laid there about an hour or longer and kept asking them how long before the doctor would come. After a while the doctor came, there were two doctors, and they said they believed another doctor would like to take part. They called him up over the 'phone and I waited there until he came before my leg was amputated.

38 Q. Who amputated your leg?

A. I think Dr. Runyan was the chief operator. Dr. Lenow was the surgeon for the Choctaw Infirmary at that time, but I don't think he had much to do with it. Dr. Runyan did the best part of the work.

Q. Dr. Lenow was the surgeon of the railroad?

A. Yes sir, and he called in the other doctor.

Q. And he said they would have to cut your leg off?

A. Yes sir.

Q. And they took it off? A. Yes sir.

Q. How long were you sick with it?

A. I laid up in the hospital from the 6th of February until to the 16th day of April.

Q. Did you have any doctor's bills?

A. No sir, not in there I didn't.

Q. Any medical bills?

A. I paid medicine bills after they discharged me.

Q. What did your medical bills amount to?

A. All my medical bills and doctor's bill was about $100.00.

Q. Did you pay those bills on account of this injury?

A. I laid it to that. After I got out I [—] taken down sick with pains in my legs, and I had chills. My leg was sore a long time after I was discharged.

Q. The injury brought it on?

A. Yes sir. I had pains in my leg and big sores came on it.

Q. Were they painful?

A. Yes sir. I couldn't raise myself up, or sleep at night. For a while I couldn't bear to get on my crutches.

Q. Did you have any other effects from the injury?

A. I lost the use of this arm. I couldn't use it until last Christmas, I just began to use it since Christmas. In December that hand was right down that way, I couldn't raise it up. I showed it to the doctors.

39 Q. What was the condition of it before?

A. I never had any trouble with it before.

Q. How much were you making at the time of the accident? A. I think we were making $65.00 a month.

Q. What was the condition of your general health?

A. I was in good health. Never had been sick in my life. I was strong and active.

Q. You are thirty-three years old now, you were thirty-two then? A. Yes sir, thirty-two.

Q. Did you know that there was anything the matter with the step when you got on it? A. No sir.

Q. Did you know the condition of the ties, whether they were filled in or not at that time?

A. No sir, I didn't ever pay any particular attention to them. I never had been in there more than once or twice and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two, or three and sometimes on the lead.

Q. You don't recollect ever having been on that track at all? A. No sir, not that I know of.

Q. What kind of a night was it?

A. Well, it was raining, it was dark, it had been raining all day.

Q. After you were hurt and were lying there on the ground, how far from the track were you?

A. About a foot and a half from the track.

Q. Did you notice the condition of the track?

A. The ties were not filled in. I asked for my lantern and had it lit. I set it on the side of the track so if any engine came into the yards, they wouldn't run over me I raised up and looked around at the ties and there wasn't any dirt between them.

Q. Was there anything there between the ties?

A. No sir, just laying up on the ground.

Q. Do you know what is the customary and safe way to fix yards?

(Counsel for defendant objected to the above question as incompetent, irrelevant and immaterial to the issues in this cause. The Court overruled said objection and the defendant saved its exceptions.)

40 A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to

get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

(Counsel for Deft. objects to answer for same reason. Objection overruled and Deft. excepts.)

Q. If it had been filled in level with the top of the ties, could you have got your foot caught in there? A. No sir.

Q. If it had been filled up level with the top of the ties, you could not have got your foot caught? A. No sir.

Q. If you had just slipped off as they claim and the ties had been filled in level, could you have got your foot out of the way of the engine?

A. If the track had been filled in level and I had slipped off I could catch myself. If they had been filled in level there would not have been any hole to get your foot caught in. I have been on engines before and my foot has slipped off and hit the ground and I could hold by my hands and raise up. In other yards where the ties were level I have slipped off lots of times and caught myself. There is no chance to get your foot caught in there. If you slip off you can raise your feet right up again.

Cross-Examination.

Q. You say you have slipped off pilots lots of times before and could get out of the way? A Yes sir.

Q. Then you know that a man is liable to slip off when he attempts to get on those steps? A. No sir.

Q. You have fallen? A. Yes sir.

11 Q. You know that when a pilot is slick and a man attempts to get on that step he is liable to slip off?

A. I don't know.

Q. You stated that you had fallen off lots of times and were able to recover yourself?

A. Yes sir, I would be able to catch myself.

Q. You know that a man is liable to slip off those steps if he undertakes to get on there in wet weather?

A. I don't know.

Q. You have slipped off?

A. Yes sir, I have slipped off wet days and dry days. I have seen some break off.

Q. You know that men do slip off dry days and wet days, and that some break off? A. I have seen some break off.

Q. How long had you been working for the Memphis and Little Rock road before you went to work for the Choctaw?

A. I don't know. I think the Choctaw, Oklahoma and Gulf had it in possession when I went to work.

Q. When did you go to work? A. In December.

Q. Did you ever work for the Memphis and Little Rock road prior to that time? A. No sir.

Q. You went to work in December? A. Yes sir.

Q. When did they commence to put in those new yards over there? A. I don't know exactly when.

Q. Well, to the best of your recollection?

A. I couldn't say, I wasn't here.

Q. Was the new yard there when you got here?

A. It wasn't done.

Q. How do you know? A. They weren't using it.

42 Q. Were they using the other yard? A. Yes, sir.

Q. How many times had you been over there?

A. When I first came in here?

Q. Yes, sir. How many times were you in there altogether?

A. Only when I would go out. When I would go and put the engine away I wouldn't go back until next morning.

Q. Where did you live when they were working there?

A. 410 Maple Street.

Q. Were the trains going out the old Little Rock and Memphis road? A. Yes, sir.

Q. And they were not using the new yard? A. No, sir.

Q. Whenever you made a trip out you had to pass through the new yards or pass the old track, didn't you?

A. When we went out, we made up our trains on the scale track.

Q. Where is the scale track with reference to the new yards? A. It's down on the lower end to the right.

Q. That's below these new yards? A. Yes, sir.

Q. Sometimes you went over that track?

A. Yes, sir, we generally head from the old main line when we first commenced, and cut the engine off next to the roundhouse.

Q. At any rate if you went down from the old yards you had to pass below the new yards? A. Yes, sir.

Q. When you came back again you had to go along the old line out through the new yards? A. Yes, sir.

Q. Are the new yards in sight from the track?

A. Yes, sir.

Q. What was your business on those freight trains?

A. I was head brakeman.

43 Q. What was your position going out?

A. Going out of the yards, it was on top of the train.

Q. Now, if you were on top of the train going out you could see the new yards, couldn't you, if you looked?

A. I couldn't look at the new yards and watch my business.

Q. The only thing to keep you from seeing them is the fact that you didn't look? A. Yes, sir.

Q. You do look around, don't you?

A. Yes, sir, sometimes.

Q. You could have seen it if you had looked over there?

A. Yes, sir.

Q. How many times did you say you had gone out of the new yards? A. Not over three times.

Q. What part of the new yards did you leave from?

A. Well, the first time our train was made up on No. 1 track.

Q. Did you have to help make up the train? A. No, sir.

Q. What is your business just before you start?

A. We haven't got any duty at all until we get our engine and couple it on to the train.

Q. This train was standing on the first track?

A. Yes, sir.

Q. How did you get up there?

A. Come up on the main track.

Q. Did you walk? A. No, sir, rode the engine.

Q. What time was it when you left on that first trip?

A. About 6:10 in the morning.

Q. Was it dark?

A. Yes, sir, we had to use lanterns.

Q. What time did you get back on that trip?

A. Sometimes we get in in the daytime and sometimes at night.

Q. Now, the first trip, do you remember whether you got back in the day or at night?

A. I don't just exactly remember. I think the first
44 trip we were out two or three days. I don't know whether it was in the day or at night or when it was we got in.

Q. The first trip that you came back in the daytime, what track did you come in on?

A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use. So I backed out and headed down the new yard.

Q. Could you see, when you headed in on that track, that those ties were not filled in?

A. Yes, sir, I saw some of them were not filled in.

Q. Were any of the ties on that new track filled in?

A. Not as I know of.

Q. All that you know of were not filled in? A. Yes, sir.

Q. Do you know of any that were filled in?

A. Yes, sir, I think they were filled in up next to the lead, they were filled in next to the main line.

Q. That is, where if coupled on to the main line, but after you got down into the new yard you don't know of any that were filled?

A. I didn't pay any particular attention to it.

Q. Do you mean to say that you would come in on that track and not pay any attention to the ties?

A. All I paid attention to was the switches.

Q. If you were standing there turning a switch, you couldn't help but observe whether the ties were filled in or not?

A. No, sir, I don't know whether I could or not. A man isn't on the ties, he throws the switch. Coming in, they might not stop the engine and you have to be in a hurry to get the switch thrown.

Q. Do you mean to say that you throw the switches without looking at anything else?

A. I look at the switch and see if it matches the rails.

Q. You say at the time of the accident, you left the
45 yards about 8 o'clock that morning?

A. Yes, sir, we left about 8 o'clock.

Q. You got back about 10 o'clock that night?

A. No, sir, the next night, Tuesday night.

Q. Did you have your lantern in your hand when you came down to throw these switches? A. Yes, sir.

Q. How did you go along?

A. I walked on the outside of the track to the first switch.

Q. Why were you walking on the outside?

A. I was trying to find a clear track, I had to walk out there to see if the track was clear, so I could see around the curves.

Q. Did you look to see if these ties were filled in or not?

A. No, sir.

Q. You had your lantern? A. Yes, sir.

Q. You could have seen?

A. Yes, sir, if I had taken time I suppose I could.

Q. What kind of a headlight did that engine have?

A. It had an electric headlight.

Q. Are not these electric headlights very brilliant?

A. Yes, sir, but you can't see around the curve.

Q. That wasn't on a curve, was it? A. Yes, sir.

Q. Didn't that electric headlight light light up the lead track down in front of you? A. Yes, sir.

Q. The train was on the lead track, wasn't it?

A. Yes, sir.

Q. And you said you got injured on the lead track?

A. No, sir, I got hurt on No. 3

Q. Do you mean to say that you had lined up No. 3 and the train was going in on No. 3? A. Yes, sir.

46 Q. So you had already passed the track the train was going to head in on and had lined up the switch?

A. Had lined that switch up for that track.

Q. No. 3 leads out from the lead track, doesn't it?

A. Yes sir.

Q. This headlight lit up everything in front of you, didn't it? A. Yes sir.

Q. If you had looked you could have seen whether the cross-ties were filled in or not, couldn't you?

A. I suppose I could if I had stopped to look.

Q. I will ask you if this electric head-light doesn't light things up very brilliantly? A. Yes sir.

Q. You could see objects three or four hundred yards in front, couldn't you? A. Yes sir, about that far.

Q. It is so light? A. It is very light.

Q. And if an engine with an electric head-light is moving down there and you are down there you can observe as well then the condition of the track as you can in the day time, can't you? A. A man's mind is not on the track?

Q. I am not asking you that.

A. Yes sir, if he was to stop and look he could.

Q. You say you had thrown this third switch?

A. Yes sir.

Q. You gave the engineer the signal to come ahead?

A. Yes sir.

Q. When you gave the signal for the engineer to come ahead, what position did you take in order to step on this engine?

A. When I gave him the signal I stepped over into the track to catch the pilot.

Q. Into the middle of the track?

A. No sir, not in the middle of the track, on the inside of the rails.

47 Q. You had your lantern? A. Yes sir.

Q. Did you observe whether the track was filled in or not?

A. I wasn't looking at the track, I was looking at the pilot of the engine.

Q. Did you look to see where you were stepping?

A. Yes, I had my light in my hand to look up at the pilot of the engine when it come to me.

Q. If you had looked down you could have seen that the ties were not filled in, couldn't you?

A. Yes, if I had looked down to my feet I could.

Q. You were standing there on the track with your lantern in your hand and the electric head-light shining?

A. Yes sir, but I pulled my hat down over my eyes.

Q. What did you pull down your hat for?

A. So the head-light wouldn't blind me.

Q. You were standing there on one of the ties?

A. Yes sir.

Q. And the electric head-light blinded you so you pulled your hat down over your eyes?

A. Yes sir, to keep it from blinding me.

Q. You were standing looking down waiting for the engine to come up to you?

A. No sir, I wasn't looking down. I had my eyes kinder looking slanting up.

Q. You pulled you hat down so it would be down just far enough to keep the light out of your eyes? A. Yes sir.

Q. That brought your line of vision somewhere near the top of the pilot? A. Yes sir.

Q. And you waited there? A. Yes sir.

Q. And you say it was raining that day?

48 A. It had been raining that day—all day.

Q. How many times had you been on that step that day?

A. Well, I don't know. Don't think I was on it more than once or twice.

Q. You were on it only once or twice?

A. We headed into some cars at Brinkley or Forrest City and I had to get on the pilot to couple them up. I went down and coupled to them and after we pulled out and shoved the cars back and stopped the engine, I then walked up and pulled the pin.

Q. A fellow cautioned you down there about getting on it, didn't he? A. No sir.

Q. Didn't you hear a brakeman call to you?

A. No, sir, there wasn't anyone there at all.

Q. Nobody cautioned you not to get on that step?

A. No sir.

Q. You say that step is about how large?

A. Well, I guess it is about four inches wide.

Q. About the width of your foot? A. Yes sir.

Q. The width of your foot would cover the whole step?

A. Yes sir.

Q. Didn't the company have a rule against brakemen stepping on this step?

A. I never had any instructions to that effect.

Q. Did you ever have a book of rules of the company?

A. No sir.

Q. How many roads did you say you had worked for?

A. About 17 or 18 different roads.

Q. Did those other roads have any rules? A. Yes sir.

Q. Didn't you get any when you came to this road?

A. No sir. I didn't get any.

Q. When did you first find out that the step was defective?

A. I didn't ever know it was defective.

Q. Didn't you allege in your complaint that it was
49 defective?

A. I said that in my judgment and knowledge it gave way with me. When a man is catching the pilot of an engine he throws his foot up on the step and leans his whole weight on that foot until he gets hold of the top of the pilot. I got on it with my left foot and when I leaned over to get the top of the pilot it went right down with me.

Q. You don't know whether your foot slipped off or not?

A. I know that my foot went down. It didn't slip that way, it went straight down.

Q. You are just of the impression the step went off?

A. I don't know whether it went off or not, it gave way with me. At least, it went down.

Q. Did you see the step after that? A. No sir, I did not.

Q. You didn't examine it after that?

A. I couldn't examine it, I couldn't get around.

Q. Did you ever write Mr. Henry Wood, the Vice-President of the road, a letter about getting the injury? A. Yes sir.

Q. Did you make any complaint to him about any defect in the step? A. No sir.

Q. You merely told him in that letter that your foot slipped and you fell?

A. I told him that the step gave way and I slipped off it.

Q. What was it you said you wrote him?

A. I wrote him that I slipped off the step, but I didn't know how come me to slip off.

Q. You didn't tell him the step was defective, did you?

A. I don't just remember whether I told him the step was defective or not. I know I wrote him a letter concerning it, but I couldn't tell what's in the letter. It's been quite a long while.

Q. Is this the letter?

A. That's my handwriting.

(Defendant reads from said letter as follows:

50 "North Little Rock, Arkansas, July 30, 1900. Mr. Woods, General Manager C. O. & G. and C. & M. R. R. Dear Sir: On the 6th of February, 1900, I slipped off the front end of an engine, while heading in the yard on the north side, and lost my leg while performing my duty in the transportation department.")

Q. You say you never saw that step after that? A. No sir.

Q. When you get on that step, there no hand-hold on that pilot? A. No sir.

Q. What do you grasp with your hands?

A. You can catch on the top of the pilot.

Q. When a man reaches for that pilot he leans forward, don't he?

A. Yes sir, he holds with his hand on top of the pilot, his hand on this draw-head of the pilot.

Q. Did you have that defect in your right hand at that time? A. Yes sir.

Q. Describe that defect.

A. I haven't got any, any more than that finger; I can use it as good as ever.

Q. All the fingers off except the little finger and the one next to it? A. Yes sir.

Q. That step slopes also, don't it?

A. No sir, it stands rearly level.

Q. Doesn't that step slant some? A. Which way?

Q. The same way the pilot slopes?

A. Yes sir, it sets angling that way with the pilot.

Q. That step is put there to make a pilot bar coupling, isn't it?

A. Yes sir, it's put there to stand on, to catch on the front end of the pilot.

Q. After you had lined up that third switch and the train was moving toward you and you undertook to step on
51 that pilot, if you had successfully made that step and had not been injured, what would have been your next duty?

A. Line up the next switch, ride on the engine and line up the next switch.

Q. But the train was left on that track, wasn't it?

A. Yes sir, but there is a cutoff switch ahead of there.

Q. These tracks are put there to leave trains on, are they not?

A. Yes sir, but sometimes the track don't hold them.

Q. If the track had held the train that night and you had left it on that track, what would have been your next duty?

A. If the track wouldn't hold us in the clear, I would have to line up this cutoff switch and then go back and cut my engine off.

Q. Suppose there had been no more switches to line up and the track would hold you, what would be your next duty?

A. If there hadn't been any more switches I wouldn't have been there.

Q. Wasn't your duty to cut the engine off and take it to the round-house?

Q. If there hadn't been any more switches there I wouldn't have been there.

Redirect Examination.

Q. You say there was another switch in ahead of your?

A. Yes sir.

Q. At the time you got hurt?

A. Yes sir, there was some more switches.

Q. When are you supposed to leave your engine and be done with your work?

A. Not until we cut it off and carried it to the round-house and put it on the proper track.

Q. And it is your business to stand on the front until the train is through? A. Yes sir.

Q. It was your duty to get on that step to make couplings and also to get on there and ride into the switch-yard.

52 A. Yes sir, it is the head brakeman's place to ride in front of the engine.

Q. Had anybody ever told you not to do that? A. No sir.

Q. And that was not only the custom of that road but of other roads? A. Yes sir.

Q. At the time you got hurt, when you tried to step on that step, state whether or not that was required of you by your duty? A. Yes sir, I was at my duty.

Q. Then you were in the discharge of your duty at that time? A. Yes sir.

Q. Now, why did you write to Mr. Wood? Did anybody ask you to put in a written application?

A. No sir, I was in a suffering condition and needed some money and was down sick and had nothing and wrote him simply for a compromise.

Q. You didn't say anything about the step at all?

A. No sir.

Q. And at that time, had you been able to make any investigation as to the cause of your injury?

A. No sir, I never made any investigation.

Q. When were you able to get out of the house?

A. I got out when they discharged me from the hospital. I was out about six or seven days and my leg swelled up and it commenced paining me and I told them to telephone to Dr. Inow about it to see whether he could do anything for my leg. He telephoned back to them to bathe it in warm water and the swelling would go down. When they discharged me from the infirmary my leg wasn't sound and well. I was down with it about 5 or 6 weeks after that.

Q. Did they send any one to you to investigate this case after you wrote this letter? A. No sir.

Q. Did you ever tell any of them that the step did not careen or break with you? A. No sir.

53 Q. You stated that the first time you went into the new yards, you started down the old track and they told you to head into the new yards?

A. No sir, not the first time. The first time I went into the new yards I went down the old main line.

Q. Who told you to go into the new yards the first time you went in there? A. Mr. Wilson, the yardmaster.

Q. He told you this yard was ready for use? A. Yes sir.

Q. When was that?

A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

Q. You went in on the new track, what sidetrack did you go in on? A. I think it was No. 1 track.

Q. You made how many trips after that into the new yards before you were hurt? A. About three.

Q. What tracks were you on before?

A. The first time we headed in on No. 2 and the next time all the tracks were filled up with cars and we went around on the lead.

Q. Where did that throw you?

A. That throwed us on the outside of the yard on the last track in the yard.

Q. What track were you hurt on? A. No 3.

Q. You never had been on that track before?

A. No sir, I never had headed in on No. 3 track.

Recross-Examination.

Q. Mr. Blackwood asked you at the time you wrote this letter if you had been able to get out to make an investigation of this step, what did you answer.

A. I told him that I had never been out to make any investigation.

54 Q. Do you mean to say that you had to go out to make an investigation before you could ascertain whether the step gave way or not?

A. I mean that I hadn't been able to get out to see about it.

Q. You said you had not been able to get out and make an investigation.

A. I meant I had never seen the engine.

Q. Do you mean to say that you would have to investigate the engine before you could tell whether the step gave way or whether you slipped?

A. No, sir, I was perfectly sure that the step gave way, for if my foot had slipped I could have pulled it right back.

Q. And when you wrote that letter you were just as fully advised as you are now? A. Yes, sir. I guess so.

Q. Now, he asked you if the railroad company had ever sent anybody to you and if you had ever told any of them that the step did not give way or break. You answered "no." I will ask you if you told any of them that it did give way and break? A. I told them that it give way with me.

Q. Whom did you tell it gave way?

A. I told Mr. Vaughan.

Q. Where? A. In the hospital.
Q. Did you tell anybody else? A. I told Mr. Kilpatrick.
Q. Who is Mr. Kilpatrick? A. The Chief Claim Agent.
Q. Where did he see you?
A. I don't exactly remember, he was talking to me about it and I told him.

Redirect Examination.

Q. Who is Mr. Kilpatrick?
A. He was the Chief Claim Agent at that time.

Recross-Examination.

54 Q. You said you were on that step two or three times that day.
A. I don't think I was on it more than once or twice.
Q. Did you notice anything wrong with the step then?
A. No, sir, I never had no idea of the step being loose and never paid any attention to it.
Q. If it had been loose, though, you would have detected it, wouldn't you?
A. Yes, sir, probably I might, but the engine was standing still one time when I got on it.
Q. It was running pretty fast, wasn't it? A. No, sir.
Q. If it had been loose you would have detected it?
A. I don't know.

Mr. Blackwood:
Q. Did you ever get on it when it was standing still?
A. Yes, sir.
Q. That's the only time got on, at Forrest City?
A. Yes, sir.
Q. There is no yard between here and Memphis, is there?
A. No, sir, no regular yard.

56 Wesley Graves, being recalled, on behalf of the plaintiff, testified as follows:

Direct Examination.

Q. You were on the stand a while ago, I will ask you when you saw this step next before this accident occurred to Tom Tennessee?
A. I seen it the last trip I went out with the engine and cautioned my brother not to try to catch on to that pilot, that the foot-plate was loose on it.

(Counsel for defendant objected to the above answer as incompetent, irrelevant, and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. Did you inspect it? A. Yes, sir.
Q. I believe you stated it was a Rhode Island engine.
A. Yes, sir.
Q. Do you know how old it was?
A. No, sir, I don't know exactly how old it was, but it was something like five or six years old. It come down from the west end.
Q. What trip did you make with this particular engine?
A. From Argenta to Memphis.
Q. Did you come back with the same one?
A. Yes, sir, come back with the same engine.
Q. You saw that step how long before Tom Tennessee was hurt? A. Something like three or four days.
Q. Could the inspector have found out the condition of that step if he had inspected it?

(Counsel for defendant objected to the above question as incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

A. Yes, sir.
Q. How?
A. It was loose, you could see the condition of it.

57 Court:
Was it so loose that by stepping on it you could tell it was loose? A. Yes, sir.

Mr. Blackwood:
Q. How long was this before the accident occurred?
A. Something like three or four days.
Q. Did you see it any more after you saw it the next morning after Tom was injured?
A. I never seen it no more. The next morning I went down through the yards and the piece had been removed.
Q. Wasn't on there at all? A. No, sir.

(Counsel for defendant objected to the latter part of the preceding answer and the foregoing question and answer as incompetent, irrelevant and immaterial to the issues in this cause. The court overruled said objection and the defendant saved its exceptions.)

Q. How long have you been switching for this company?
A. I have been in the service of the old company ever since 1888 up to the 19th of last March.
Q. What is the proper position of the head brakeman going into the yards at North Little Rock?
A. He is supposed to ride on the front end of the engine.
Q. What for?

A. To line up the switches and keep an engine from derailing by going out of an open switch, and to see that the track is clear.

Q. Where does he stand?

A. He is supposed to have a place to ride.

Q. Where is that? A. Have a foot-plate on the pilot.

Q. Is that the customary place for the head brakeman to ride? A. Yes, sir, that's the proper place.

58 Q. Were you in the habit of doing it?

A. Yes, sir, I always do it, I do it up till this day.

(Counsel for defendant objected to the above answer as incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of? A. No, sir.

Q. Do you know of any rules against it?

A. I don't know of any rule to prevent a man from riding on there when they instruct him to ride on there.

Q. Did you see this man soon after he was injured?

A. Yes, sir.

Q. Did you see him after that night?

A. I never seen him again for three months.

Q. You don't know how long he was sick? A. No, sir.

Q. Did you see the condition of those cross-ties at the time this accident occurred? A. Yes, sir.

Q. What was the condition of them?

A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in—none of the yard at all was filled in.

Q. If it had been filled in between the cross-ties, how far would the pilot be from the surface of the ground?

A. It would be something like three inches, three or maybe four inches.

Cross-Examination.

Q. Do you profess to know what the rules of this company are? A. The Choctaw?

59 Q. Yes, sir.

A. No, sir, I don't profess to know the Choctaw rules.

Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir, that's the instructions from the conductors.

Q. Did you ever see a book of rules?

A. Yes, sir, I have seen some books of rules.

Q. I wish you would point me out a rule that requires them to ride on the front end of an engine. Did you ever see a rule of that kind?

A. Yes, sir, I have seen that book of rules, but I never read them.

Q. Is it not a fact that there is a rule which prohibits employes from stepping up on the front end of an engine as it approaches them?

A. There is a rule which prohibits them from stepping up on the front end of an engine when it is going at a high rate of speed.

Q. Please read rule No. 202 from the general rules and regulations of the operating department of the Choctaw, Oklahoma and Gulf Railroad, November 11th, 1898.

A. We weren't using them.

Q. Don't you know that they were using these rules?

A. They weren't at that time.

Q. What rules were they using?

A. We were working under the standard rules.

Q. Are these the standard rules? (Referring to book of rules set out above.)

A. Yes, sir, those are the standard rules all right.

Q. If you were working under the standard rules and these are the standard rules, you were working under these rules weren't you?

60 A. Well, what's that you want me to read?

Q. Read the rule.

Court: You were asked to state whether it was not against the rules of the Choctaw Company for any brakeman to ride on that step there when the engine was approaching, except when they are attaching the engine to cars, or coupling.

A. I am satisfied I never had any instructions not to ride on the front end of the engine coming in on a track. I always had instructions to ride there.

Court: How did you get that instruction? Did you get it from the book of rules?

A. I got it from the conductors.

Court: Not from the rule book?

A. I don't say I could find it in the rule book.

Court: Did you ever see it in the rule book? Did you ever see a rule book? A. Yes, sir, I have seen rule books.

Court: Did you ever notice in there what the rule is?

A. Well, I don't remember just exactly what the rule is.

Mr. Peirce:

Q. Read rule 202.

(Witness read rule as follows: "Employes are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices.").

Q. You say these were new yards?

A. Yes, sir, they were new yards.

Q. You were working for the road at the time Tom Tennessee was? A. Yes, sir.

Q. How many times were you in those yards?

A. Come in twice a week, and had to go out twice a week.

61 Q. Tennessee was performing a similar service on other trains, wasn't he? A. Yes, sir,

Q. Was he on a regular run? A. Yes, sir.

Q. Tennessee would be coming in as you went out, would he?

A. Yes sir, and sometimes we would both go out the same day.

Q. You were coming in and going out of the new yards?

A. Yes, sir.

Q. Did you know about how those yards were constructed over there? A. Yes, sir, pretty well.

Q. You could see it, couldn't you from coming in and going out? A. Yes, sir, you could see the yard.

Q. It was perfectly apparent to the eye, wasn't it? In other words, you could see that these ties were not filled in, couldn't you?

A. Yes, sir, you could see that the ties were not filled in.

Q. Wasn't this a new yard that was put in after the Choctaw bought the road from the old company? A. Yes, sir.

Q. They were doing considerable work, weren't they?

A. Yes, sir, they were putting in new yards.

Q. Making an entire change, weren't they? A. Yes, sir.

Q. Making a new line almost? A. Yes, sir.

Q. Enlarging their terminal facilities? A. Yes, sir.

Q. They were making extensive repairs? A. Yes, sir.

Q. Working on all the old bridges?

A. No, sir, not all of them.

Q. A great many of them? A. Yes, sir.

62 Q. They were raising the dumps?

A. They were working on the dumps, but they weren't raising them except over there in the bottoms. In a great many places they were widening the dumps.

Q. They have practically made a new road-bed out of it, haven't they?

A. Yes sir, I suppose so, I haven't been over it in a year.
Q. They were enlarging it in every way? A. Yes sir.
Q. They were working in almost every department of the road? A. Yes sir.
Q. Wasn't that new yard over there somewhat in a chaotic condition? A. Well, the tracks were all laid and in service.
Q. They were all new, weren't they? A. Yes sir.
Q. They were still working, weren't they?
A. Yes sir, they had quit work in the yards, and had the track laid, but not filled in.
Q. If you go along the lead track you can see all the new yard, can't you? A. Yes sir.
Q. When you go around that lead track you can get a pretty good view of the yards?
A. Well, if there are cars standing on the track you can't see down the track.
Q. After you get down in the lead track you can see the condition? A. Yes sir.
Q. If you are sitting up on the front end of the engine, you can see the condition of the lead track, can't you?
A. Only for a certain distance.
Q. As you go out, you can see the condition of it?
A. Yes sir.

63 Redirect Examination.

Q. You say you had been working for this company how long?
A. Ever since the 23rd day of December, 1888.
Q. You worked for this company right along since that time? A. Yes sir.
Q. Up to what time?
A. Up to the 18th of March, I believe.
Q. You know what the custom was about these brakemen riding into yards? A. Yes sir.
Q. What was that custom?
A. It's the custom to ride on the front end of the engine and line up the switches.
Q. Was that the custom after the Choctaw and Memphis was bought by the Choctaw, Oklahoma and Gulf Ry.?
A. Yes sir.
Q. Do you know whether these rules, these printed rules, were generally distributed to brakemen, or not?
A. In February or March when these rules were sent down they only got a small supply and they were only issued to the conductors and engineers and the brakemen didn't have any of them in their possession.
Q. Did you ever have one of these books? A. No sir.
Q. You never owned one? A. No sir.

Q. Where did you see them?

A. I seen them with the conductors, I only saw two or three of them. I never did see a brakeman with one.

Q. What would be a safe condition for a track in a yard?

A. Well, a safe condition for a track in a yard is for the track in the center to be filled, and on the outside of the ties and in between the rails, and blocks of timber in between the frogs.

Q. You mean these spaces in between the ties are filled?

A. In the yard they are supposed to be filled up level
64 with the top.

Q. Do you know when they first began to use these new yards?

A. Well, no sir, not exactly, I think it was before Christmas, a little before Christmas.

Cross-Examination.

Q. You are a brother of Hilliard Graves? A. Yes sir.

Thomas Tennessee, plaintiff, being recalled, testified
65 as follows:

Direct Examination.

Q. Did you ever have any of those printed rules, like that book? A. No sir, I never saw one until after I got hurt.

Q. You never got any printed rules of this company?

A. No sir.

Q. What was the number of the engine you say you were on? A. C. O. & G. engine No. 5.

Q. Do you know what make it was? A. Rhode Island.

Cross-Examination.

Q. You know that all railroads generally have rules?

A. Yes sir, all the railroads I ever worked for in my life furnished me with a copy of the rules before I went out.

Q. You know then as a general rule railroads have rules?

A. Yes sir.

Redirect Examination.

Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of the engine into a yard?

A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

Q. What do you mean by getting days?

A. They would pull me off from my work and lay me off 10 or 15 days.

Q. Trying to punish you for not riding on the front end?

A. Yes sir.

Recross-Examination.

Q. You stated just now that it was your business to ride on the front end of the engine by the rules on other roads. Now what about rules on other roads in reference to stepping on an engine moving towards you?

66 A. I think it states the right speed for a man to catch the engine.

Q. Do you remember what it is.

A. No sir, I do not.

(Plaintiff introduces Carlisle's Tables in evidence showing that the plaintiff's expectancy is 23.9 years.)

Plaintiff rests.

67 Whereupon, the defendant, to sustain its defense, introduced the following testimony, to-wit:

R. A. Vaughan, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. Mr. Vaughan, where do you live now?

A. Fayetteville, Arkansas.

Q. Where were you at or about the time Tennessee was hurt on the 6th of February, 1900?

A. I was living at Little Rock.

Q. By whom were you employed?

A. In the Legal Department of the Choctaw Railroad.

Q. Did you have any talk with Tennessee about this accident after it occurred? A. Yes, sir.

Q. He stated here on the stand a while ago that he told you after the accident occurred that he attempted to get on the step, the step gave way and he fell, I will ask you if he ever made any such statement to you? A. No, sir.

Cross-Examination.

Q. How come you to go over there?

A. Well, we investigated all injuries and I will explain another reason why I went. He had some garnishment cases against him, and I think there was a little balance due him and I went over to ask him about that.

Q. Where did you see him? A. At the hospital.

Q. Do you recollect the date? A. No, sir, I do not.

Q. Did you ever take a written statement from him?

A. Yes, sir.

Q. Where is that written statement?

68 A. I think it is among those papers.

Q. Did he say anything about the step at all?

A. Said that he slipped off the step, that his foot slipped is my remembrance of it. I wrote it down in the statement.

Q. He says, (reads the statement) "I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch, the head-light blinded me, I attempted to get on the pilot and the train was going three or four miles an hour, and my left foot slipped and I fell between the pilot and the rails." Did he go into particulars about how he slipped?

A. That statement is as much as I remember about it.

Q. Have you seen this statement to-day?

A. I glanced over it.

Q. Couldn't he have told you that the step gave way?

A. If he had, I think I would have put it in.

Q. You didn't put down what he said word for word did you? A. No, sir, not verbatim.

Q. You don't pretend to have used his own words, his own language? A. I think so, substantially.

Q. How many people were there?

A. Well, I don't remember, I think perhaps no one except myself.

Q. Why did you take his statement down?

A. That's the custom in investigating all injuries.

Q. You were taking it down to be used in case he brought suit? A. We wanted the facts.

Q. Do you know how long he had been at the hospital?

A. No, sir, I do not. I remember that at the time of the injury a report was made of his injury.

Q. It was a few days after, wasn't it?

A. I don't remember, I think it was sometime after, perhaps a month or six weeks. He was sitting up when I went there.

Q. He was then in the hospital? A. Yes, sir.

69 Redirect Examination.

Q. This statement is here? A. Yes, sir.

Counsel for defendant read statement to the jury as follows:

"My name is Tom Tennessee. I was brakeman on Train No. 13, Engine No. 5, west bound on Feby. 6, 1900, about 10 o'clock P. M. as we entered the yards at Argenta. I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch the

head-light blinded me. I jumped on the pilot as the train was running 3 or 4 miles an hour and my left foot slipped and fell between the pilot and the rail, which threw me off of the pilot in front of the engine between the rails. I rolled my body and right leg out of the track, but my left leg was caught and cut off just above the knee. I was not injured otherwise. The engine, after the first wheel hit my leg, made a good stop. I hallooed before that but don't know whether he heard me. I don't think that he saw me or heard me either. At the time I was hurt it was raining and the pilot was slick. I have been braking 15 or 16 years and have been hurt three other times in the service. I was on the engineer's side when I attempted to get on the pilot. Nobody saw the accident."

(Signed) TOM TENNESSEE.

70 Thomas Cuneo, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Tom Cuneo.

Q. Where do you live? A. Over in Argenta.

Q. What business were you engaged in on the 6th of February last year?

A. I was running an engine for the Choctaw, Oklahoma and Gulf.

Q. Are you still in the employ of the company?

A. No, sir.

Q. How long has it been since you were in the employ of the company? A. The 25th of last November.

Q. Mr. Cuneo, do you remember the night Tom Tennessee had his leg cut off? A. Yes, sir.

Q. Just begin now in your own way, and clearly and explicitly as posssible explain to the jury how it happened.

A. We come into Argenta and stopped on the main line and he threw the switch for the yard, then he went over on the second track and threw the third switch and gave his signal to come ahead. When I come up to him he made to get on the little step on the pilot and it was raining and slippery and he slipped off and the wheel ran over his leg. I couldn't see him at the time he slipped on account of the front end of the engine. It was raining and slippery and he hallooed and I stopped.

Q. Did you have any talk with him immediately after it happened?

A. No, sir, he didn't say nothing to me at all. I got down and looked at him and he said the wheel run over his leg, that's all.

Q. Did he say whether he slipped off or not?

A. Didn't say nothing of the kind at all.

Q. As you approached him did you see him?

A. Yes, sir, he was right down beside the engine.

71 Q. I mean before he was struck? A. Yes sir.

Q. Where was he standing?

A. He was standing just in the clear of the track on the side of the track, and when we got up to him he made a step to get on this step, of the pilot.

Q. Just describe that step on the pilot to the jury?

A. It's about 18 to 20 inches long and 4 or 6 inches wide. It is made rough to keep a man's foot from slipping off of it.

Q. What position did Tennessee occupy on that train?

A. He was head-brakeman.

Q. When he came into the yards what was his duty?

A. His duty was to throw the switches for the engine to head into the yard.

Q. What sort of pilot did that engine have?

A. A pilot like any other engine; a long pilot.

Q. Is there any difference in pilots on engines?

A. Yes sir, some are not as long as others.

Q. This was one of the long kind? A. Yes sir.

Q. How fast were you running?

A. Not over four miles an hour.

Q. How far did you run from the point where he fell?

A. Not over ten feet, he was laying opposite the third drive-wheel when we stopped.

Q. You stopped as quickly as possible after you heard him halloo? A. Yes sir.

Q. Mr. Cuneo, I will ask you what that step was put on that engine for?

A. It is put there to make couplings ahead, pilot-bar couplings.

Q. Just explain to the jury what you mean by pilot-bar couplings.

A. There is a bar that runs out of the end of the pilot. You raise it up so as to extend far enough to keep the pilot from striking the box car. You get on that step to make the coupling.

72 Q. Is it put there for any other purpose?

A. No sir.

Q. I will ask you if Tennessee had any business stepping on that step at the time he fell?

A. No sir, not until we got into the clear which would have been about twenty car lengths, and cut the engine off.

Q. At the time he fell, I will ask you if he had any business for which that step was constructed to step on that step?

A. No sir, there weren't any cars on the track at all.

Q. Then the only purpose is for a man to make a pilot-bar coupling? To step on it and stand while he raises the bar

and puts it into the draw-head of the car he is going to couple to? A. Yes sir.

Q. What was his next duty at that time? If he had not fallen and been injured, what would have been his next duty?

A. When we got into the clear he would have to cut the engine off from the train.

Q. If that was the case, where should he have stepped up after lining up the last switch?

A. He could have got on the step on the back of the tank or on the ladder of the first box-car.

Q. And rides down into the yard until you get into the clear, and then what does he do?

A. Cut the engine off, pull the pin or uncouple the coupler.

Q. Then when he attempted to step on the front of that engine that night, instead of stepping there on the front of the pilot he should have taken his place at the back end of the engine, should he? A. Yes sir.

Court: What was his duty after he had made that third switch?

A. After we got the train in the clear he should have cut the engine off and taken it into the round-house.

Court: Was the train to stop there immediately after it got on that switch? A. Certainly.

73 Court: How was he to get on the train in order to do that?

A. There are ladders on the box cars and a step on the back end of the tank.

Court: Then instead of getting in front of the engine, his duty was to get on the tank? A. Yes sir.

Court: Was he to get on at the place he did, or was he to walk on further?

A. He was supposed to get on where he did only behind the engine.

Mr. Peirce:

Q. Mr. Cuneo, when a man does get on that step for the purpose of making a pilot-bar coupling, is he supposed to get on when the train is in motion or at a standstill?

A. If he wants the engineer to stop he is supposed to give him a signal to stop.

Q. He has the power to do that?

A. Yes sir. He doesn't have to get on while the train is moving unless he wants to.

Q. That night, if he had signalled you, you would have had to stop and would have stopped? A. Yes sir.

Q. I will ask you if there are any other steps on engines, on freight engines, on the back end of the engines?

A. Yes sir, there is a big step about 8 inches wide.

Q. And how long? A. About 8 feet long.

Q. Made of heavy board? A. Yes sir, two-inch board.
Q. Are there any hand-holds on it?
A. Yes sir, they always have hand-holds.
74 Q. Now, this little step on the front end of engines, is there any hand-holds on it? A. Yes sir.
Q. Whereabouts is it? A. Right on top of the pilot.
Q. How do you reach it? A. A man can reach that far.
Q. But he has to lean over, doesn't he?
A. Yes sir, you can't see him sitting in the engine until he gets up.
Q. When he goes to step up on the front end of that pilot and put his foot on that step, he would be sort of leaning over to reach that hold on the top of it? A. Yes sir.
Q. Mr. Cuneo, how long have you known Tom Tennessee?
A. I don't know, he made two or three trips with me, two trips that I know of.
Q. In coming in and going out, where do you go from and come to, what part of the yards?
A. What part of the yards?
Q. You don't go on the same track every time do you?
A. Went in on which ever one was clear.
Q. You went into the new yards? A. Yes sir.
Q. Did you know the condition of these yards? A. Yes, sir.
Q. Was it perfectly patent and apparent to the eye, the condition of the tracks and the ties?
A. Certainly.
Q. Anybody could see, if they ran in there? A. Yes sir.
Q. You made two trips with Tennessee? A. Yes sir.
75 Q. Did you go out in the day or at night?
A. I don't remember.
Q. Do you remember what time you left when you went out on that trip?
A. I left here about 7 o'clock, or maybe 6:55, it was daylight.
Q. Did you leave from the new yards? A. Yes sir.
Q. When you started back—you were the engineer on that trip—where did you start from on your return trip?
A. From Hopefield, just across the river from Memphis.
Q. Did you inspect your engine before you left?
A. Yes sir.
Q. Was that your business? A. Yes sir.
Q. Did you make a careful inspection? A. Yes sir.
Q. What was the condition of the step then?
A. It was all right.
Q. Did you inspect the step when you got in that night?
A. Yes sir.
Q. After the accident? A. Yes sir.
Q. What was the condition of it then?

A. It was all right.

Q. After you had cut the engine off, and looked at the step it was all solid, was it? A. Yes sir.

Q. Had you seen Tennessee on that step before on that day?

A. Yes sir, he got on it at Forrest City going about 12 miles an hour. A brakeman standing there halloed at him and said, "What are you trying to do, get killed?" He rode about two or three car lengths on it that time.

Q. I will ask you if it is not a dangerous thing to step on that little iron step when the engine is in motion? Is it apparently dangerous for a man to step on that little step when the
76 train is in motion? A. Yes sir.

Q. How would you consider it that night?

A. It was very dangerous, it was wet and slippery.

Q. Was it very dangerous under the circumstances that night? A. Yes sir.

Q. He had no duty to perform that required him to step on that step at that time? A. No sir.

Q. When you went out on that trip did you make an inspection of your engine? A. Yes sir.

Q. And the step was all right then, was it? A. Yes sir.

Q. And when you returned you made an inspection of your engine at Hopefield and the step was all right? A. Yes sir.

Q. How are those tracks in those new yards situated with reference to the old main line of the Little Rock and Memphis Railroad? How near to it are they. Do they all run down together?

A. No sir, they go close to the old yard, one track leads from one over to the other, but they don't run together.

Q. When you get on the old main line of the Memphis and Little Rock road and go down that line to the lower end of the yard, as you come in is it not a fact that the new yards are in plain view? A. Yes sir, the new yard is in plain view.

Q. How far is it? A. From the old yard?

Q. As you go down about where the new depot is and near where Tennessee got hurt, how far is that from the old track of the Memphis and Little Rock road?

A. It is about 75 yards, I suppose.

Q. What is there in between?

A. Other tracks and the coal chute.

Q. The coal chute is at one point?
77 A. Yes sir.

Q. The coal chute doesn't run all the way up and down? A. No sir, it is not opposite where he got hurt.

Q. What is there between the main line of the old track and the track where he got hurt?

A. There are about three other tracks between that and out main line.

Q. Are those tracks in the new yard? A. Yes sir.

Q. About that time what changes or improvements was the Choctaw, Oklahoma and Gulf making in the old arrangements over there?

A. They had built a new yard over there with eight tracks to it.

Q. Right before this accident occurred what changes had they made there or what additions?

A. They were working in there.

Q. Putting in those new yards?

A. It was all in at that time.

Q. Were they working on it at that time? A. No sir.

Q. The yards had been put in? A. Yes sir.

Q. How long before that had they been put in?

A. I don't know.

Q. Was it a short time or long time?

A. About six or eight months, I guess.

Q. When did the Choctaw Company take charge, the first of November, didn't they?

A. They took charge the 10th of December and this was in February.

Q. Then it wasn't very long before, was it? A. No sir.

78 Cross-Examination.

Q. They had been at work in the summer, hadn't they? A. They put it in there the fall before.

Q. They had quit work some two or three months before this man was hurt, hadn't they? A. Yes sir.

Q. They had been using it how long?

A. They had been using it ever since it was finished.

Q. They had been using it some two or three months before this man was hurt? A. Yes sir.

Q. How long had you been at work for the company at the time this accident occurred? A. For the Choctaw Company?

Q. Yes sir. A. From the May before to February.

Q. You say you made two or three trips out of the yard with this man Tennessee? A. Yes sir.

Q. When did you make those trips?

A. I couldn't tell you the dates.

Q. Do you know whether it was just preceding the accident or a month or two before?

A. Well, he went out with me the same trip going that way.

Q. Was that the first trip he had made? Hadn't he laid off in January?

A. No sir. He made another trip, but I couldn't say when it was.

Q. He laid off during January with a sore toe, didn't he?

A. I don't remember.
Q. Was that other trip before or after January?
A. I don't remember when it was. I know that there was one trip before this one.
Q. When you came up to him that night, you saw him plainly, didn't you? A. Yes sir.
79 Q. Did you run him down? A. No, sir.
Q. You saw him, didn't you?
A. I did, standing still.
Q. You didn't attempt to run over him?
A. Certainly not.
Q. You didn't think he was in any danger did you?
A. No, sir.
Q. You were running very slowly weren't you?
A. Yes, sir.
Q. In railroad language when you speak of a high rate of speed were you running at a hight rate then?
A. No, sir, very slow.
Q. It is customary for a brakeman to swing on to the engine when they are running at a slow speed, isn't it?
A. Yes, sir.
Q. There is no apparent danger, is there?
A. Yes, sir, there is in front, there is always danger there.
Q. Did you ever see brakemen jump on this step before?
A. Yes, sir.
Q. Is it customary?
A. Yes, sir, when they make pilot-bar couplings.
Q. Is it customary when they ride up to line up the switches? A. They seldom ever get on there.
Q. They do do it sometimes, don't they?
A. Sometimes, yes, sir.
Q. You didn't think that there was anything unusual seeing him standing there? A. No, sir.
Q. Did you think that there was anything very unusual in seeing him trying to get on there?
A. He was standing in the clear and I was in the engine looking at him. He just took a step right over and stepped on this little step.
80 Q. You mean he was standing on the outside of the railroad irons or rails? A. Yes, sir.
Q. And when the pilot came opposite him he made a step to get on this little step? A. Yes, sir.
Q. You couldn't see whether he made it or not?
A. No, sir, you couldn't see that.
Q. You couldn't see him? A. No, sir.
Q. Did you know he fell?
A. No, sir, not until he hallooed.
Q. Did you have any conversation with him right away?

A. No, sir.
Q. How long did you stay there with him, or did you stay there at all? A. Not over two minutes.
Q. You just left him there? A. Yes, sir.
Q. He was lying on the ground when [he] left?
A. Yes, sir.
Q. Lying on the ends of the ties? A. Yes, sir.
Q. When you inspected this step—you say you inspected it at Hopefield? A. Yes, sir.
Q. Had you ever inspected this step before?
A. Yes, sir.
Q. How often?
A. Every time I looked around the engine.
Q. How often did you run that engine out—was that your regular engine?
A. No, sir. We didn't have any regular eng'
81 Q. They put you on whatever engines they wanted to send you out on? A. Yes, sir.
Q. How many times had you been on this engine previous to this trip?
A. I had been on it nearly thirty days, on that one engine.
Q. Was it anybody else's duty to inspect that engine?
A. They have an inspector at the shop.
Q. At what shop? A. The Choctaw shop.
Q. Here at Argenta? A. Yes, sir.
Q. Do they have any inspector at Hopefield besides the engineer? A. No, sir.
Q. Who is the inspector over there at the shop?
A. I don't know him. I am not working over there.
Q. You say Tennessee had gotten on this particular step at Forrest City, coming back this way? A. Yes, sir.
Q. And somebody hallooed at him not to do it and asked him if he was crazy?
A. Somebody asked him if he wanted to get killed.
Q. Who was that? A. I don't know.
Q. How can you recollect that?
A. It kind of frightened me, I thought I was going to kill him.
Q. When did you report that to the company?
A. Put it down on the statement when I got in?
Q. You sent in a written statement? A. Yes, sir.
Q. Did anyone call for it?
A. It is customary to send in a statement when anything happens.
Q. Did you put that in your written statement?
A. Yes, sir.
Q. About what was done at Forrest City?

A. I don't know. I couldn't say, I haven't seen the statement.

Q. The statement that you made when the accident
82 occurred, did you say anything about the incident at Forrest City?

A. Yes, sir, I think it is on there. No, sir, I see now that it is not.

Q. Then you didn't make any statement when everything was fresh in your mind?

A. Made that statement, yes, sir.

Q. That statement was made by the company, wasn't it?

A. Yes, sir.

Q. When did you sign it, just the other day?

A. No, sir.

Q. Mr. Cuneo, is it not a fact that if a brakeman would jump on that cow catcher and not get injured it wouldn't excite any railroad man's attention whatever?

A. I don't know that it would excite every man.

Q. Is it not a fact that a railroad man would pay no attention to it? A. I paid attention to it.

Q. If the train was running at a slow rate of speed that you have described?

A. At Forrest City the train was running at least 12 miles an hour, that's pretty fast.

Q. Over here? A. That was very slow.

Q. Jumping on at that speed wouldn't have attracted any special attention if he had not gotten hurt? A. No, sir.

Q. How long had you been an engineer?

A. About thirteen months.

Q. What are you doing now? A. Nothing.

Q. Will you swear that there is a step on this particular engine in the rear? A. Yes, sir.

Q. When have you seen that engine?

A. Oh! no, not now, certainly not. That engine has not been down here since last summer.

83 Q. Where is that engine?

A. On the west end somewhere.

Q. Do you know how old that engine was? A. No, sir.

Q. Don't you know that that engine had no rear step at all?

A. I don't know, all of those engines have steps on the back.

Q. Is it not a fact that this engine didn't ever have any?

A. All freight engines have got them.

Q. Was that a freight engine at that time? A. Yes, sir.

Q. Wasn't it a passenger engine?

A. It was a freight when it was brought down here.

Q. Was it built for a freight engine?

A. It was built for a passenger engine.

Q. You say that when you go around into that new yard around this lead track, that it is about 75 yards across to the place where this man got hurt?

A. Yes, sir, about 75 yards from there across to the main line.

Q. And there are three tracks in between there?

A. Yes, sir.

Q. If those three tracks had cars on them you couldn't tell the condition of the track where he got hurt, could you?

A. Couldn't tell it from the main line, no, sir.

Q. In getting on that particular part of the pilot that night when he was hurt, was this man in the line of his duty?

A. I don't think he was, no, sir.

Q. Didn't you tell Mr. House and me in the presence of this man to-day that he was in the line of his duty?

A. Yes, sir, I did.

Q. Why do you say different now?

A. Well, that engine had to be cut off from there before you could take it out.

Q. Then was he in the line of his duty? A. No, sir.

84 Redirect Examination.

Q. What sort of a light did you have?

A. An electric headlight.

Q. How great an area do those lights light up?

A. Well, you could see over a hundred yards with it pretty plain?

Q. As you approached Tennessee that night you could see him in the light of the head-light? A. Yes, sir.

Q. Was that light so plain that a man could see the condition of the road-bed and cross-ties and the construction of the track?

A. No, sir, I should think that it would have blinded him.

Q. Of course, if you were standing right up looking at the light, it would blind you, wouldn't it? A. Yes, sir.

Q. But out in front where it lights up the yard so that a man can see perfectly, he could see whether these ties were filled in or not and all about the construction of the yard, couldn't he? A. Yes, sir.

Q. This light that night lit up this particular place where Tennessee was standing, didn't it?

A. Yes, sir, lit up the whole place, lit up the whole yard as we went in there.

Q. While he was standing there waiting?

A. It lit up the whole yard, yes, sir.

Recross-Examination.

Q. I see that in this statement which you made you say, "We were coming into the yards at Argenta. He was brakeman. He threw the first switch and then rode to the second switch." Where did he ride?

A. Rode to the second switch and got off and went to the third switch.

85 Q. Where on the engine was he riding?

A. He was riding on the front step.

Q. Then he had ridden from the first switch to the third switch? A. Yes, sir.

Q. And he had ridden on the very same place that you say he attempted to get on at the time of the injury?

A. No, sir, he hadn't rode quite that far, he rode to the second switch.

Q. You stated a while ago that the main line of the old Memphis and Little Rock road going down the old Memphis track was about 75 yards from the new yards?

A. No, sir, from this switch, this side track, where he got hurt.

Q. If a man is going out on the old line from the old yards in the direction of Memphis, he would be about 75 yards from the point where he got hurt?

A. If he was on the main line, he would, yes, sir.

86 A. M. McAvoy, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. A. M. McAvoy.

Q. What position do you occupy, Mr. McAvoy?

A I am roadmaster of the Choctaw Road in the Memphis Division.

Q. How long have you been at work for this road?

A. Twenty-four years next October.

Q. Were you in the railroad business before that time?

A. Yes, sir.

87 Q. How much experience have you had as a railroad man?

A. During my life, I have put in about thirty years.

Q. What are your duties as roadmaster?

A. My duty is to see that the tracks are kept up and maintained all along the line.

Q. Do you remember when this new yard was put in at Argenta? A. Yes sir.

Q. When was it? A. In 1899.

Q. What time?

A. During the months of October, November and December, it was completed in December.

Q. Were those yards put in there in the usual way?

A. Yes sir.

Q. Were they completed in the usual time? A. Yes sir.

Q. Were these tracks put in under your supervision?

A. Yes sir.

Q. Was there any unnecessary delay in putting in those tracks?

A. No sir, we had the yard completed before we opened the road.

Q. Did you have that yard in such condition as is customary with roads that are just opening up and making improvements in their line? A. Yes sir.

Q. Considering the age of the road, considering the character of the improvements, considering the amount of work to be done, and considering all the surrounding circumstances, were those yards in the usual condition that yards are on other roads that are constructed at that period of the road's existence? A. Yes sir.

Q. I mean at the time of the accident to Tennessee, which was about February 6th, 1900? A. Yes sir.

Cross-Examination.

Mr. Blackwood:

88 Q. How much of the time did you spend in Argenta in January and February?

A. I didn't spend much time. I was all over the line, sometimes once a week and sometimes twice a week.

Q. Where was your headquarters? A. Brinkley.

Q. How often were you in Argenta in January?

A. I couldn't say.

Q. More than once? A. I couldn't say how many times.

Q. Were you there in January at all?

A. I couldn't say, but I expect I was.

Q. Don't you have any way of telling.

A. No sir, I keep no record telling where I am. I am there off and on from time to time.

Q. How often on an average have you been in Argenta?

A. As I say once or twice a week, sometimes not so often.

Q. Do you call a yard complete when the dirt is not filled in between the ties? A. Well, yes sir.

Q. Would you consider a yard complete, a yard like this, where the spaces between the ties were not filled in with cinders or gravel?

A. Yes sir, lots of places. It's all owing to the circumstances of the place at work on, the circumstances of the place

—of construction and the kind of material to be used. Some places we have to leave so in order to permit drainage.

Q. Do you consider a yard complete where the spaces between the ties are not filled in with dirt, or cinders or gravel?

A. Well, we filled in between the track and we did not fill in between the ties. We hauled dirt and filled in between the tracks last September and October.

Q. I will ask you this question—Do you consider a yard complete if the spaces between the ties are not filled in?

A. I do under certain circumstances. That's where
89 the yard requires drainage and where they cannot fill in over the top of the ties. They have to keep it exposed to let the water drain out. It was necessary for that to be done.

Q. Had it been filled in since?

A. We filled it in last September and October.

Q. Is it now level with the top of the ties?

A. In some places it is, and in some places it is not.

Q. That was your intention, to make it level with the top?

A. Something like that.

Q. Was it filled in between the ties in December, 1900?

A. Yes sir, between the ties, that is in the middle of the track it was, but not on the outside of the ties all the way across. It is what we call surfacing the track to fill in the center between the tracks. The yard was not level.

Q. You mean between the rails?

A. No, I mean between the tracks. There are eight tracks there, and we filled in between the tracks.

Q. Did you fill in between the rails on all of these tracks?

A. I wouldn't say all of them. We surfaced the yard and filled it in the best we could with the material we had. In order to surface the yard, we filled in between the tracks and put it in as good condition as we could, and after the yards were settled we hauled dirt and filled in.

Q. On all of these tracks?

A. I think so, I wouldn't be positive.

Q. In order to surface the yard, you dug in between the tracks and threw dirt in?

A. I said we hauled dirt there and threw in.

Q. Was anything done to it after you completed it in December until this man was injured on the 6th of February?

A. Not until last summer.

Court: Was that usual?

A. Yes sir, on all new yards it was, where the yards have to settle and get a foundation.

90 Mr. Peirce:

Q. Was it necessary in this case?

A. Yes sir, I think so.

Mr. Blackwood:

Q. Wouldn't it make it all the more substantial if you had filled in between the ties with cinders and dirt?

A. No sir, it would go down in mud. It wouldn't drain.

Q. Wouldn't that make it a more substantial track?

A. Yes sir, after it became settled.

Q. I would like you to explain to what extent the dirt was put in between the rails in December when you quit work.

A. Just enough to make drainage. We surfaced the track and filled in within an inch or an inch and a half from the top of the ties in the middle of the track, so the water would run off into the ditches between the tracks.

Q. That's between the rails?

A. No, between the tracks, we filled in between the rails something like that (indicating an oval shape with his hands) in order to shed the water.

Q. To what extent was that done in the yards over there?

A. We put in what we call a general surfacing. In a yard like that it has to be gone over for six or seven months or probably a year before it is thoroughly settled.

Court: Was as much of that done as was practicable?

A. At that time, yes sir.

Judge House:

Q. In December, at the time you say the yard was completed, what proportion of the track had you filled up between the rails?

A. As I said before we would fill in the middle—

Q. I don't ask you that, I ask you if you filled in a part of the switches or all of them? A. All of them.

Q. In December, at the time the yard was completed, in between the rails the dirt was put in between the ties?

91 A. That is, the dirt was thrown in the center and sloped down to the ends.

Q. How far did it slope?

A. Clear to the bottom of the rails.

Q. How near to the rails?

A. We would fill in the center, about a foot wide in the center, and slope down to the end of the ties which are about 8 feet long.

Q. Then you filled up level to the ties in the center and then it sloped towards the ends of the ties? A. Yes sir.

Q. That was all over the yard? A. Yes sir.

Redirect Examination.

Q. Considering the condition of the yard over there, did the work progress as fast as practicable to make a good yard?

A. Yes, sir.

Court: Is it usual for trains to be run over tracks in the condition that those tracks were?

A. Yes sir, that's the only way we have of settling them—using them.

Court: Do new roads usually use them?

A. Yes sir, we consider the yard complete and ready to be ballasted for whatever we feel like putting on it after it is settled?

A. M. McAvoy, being recalled, testified as follows:

Direct Examination.

Q. Mr. McAvoy, I will ask you to examine that blue print. What is that blue print?

A. Print of our new Argenta yard, in fact the whole yard over there.

Q. That's the Argenta yard? A. Yes sir.

Q. This track that is marked on there as the main
92 line, is that the main line as it exists at this time?

A. Yes sir, the second line.

Q. Now, this line that is marked "main line," is that at the present time the main track?

A. Yes sir, the old line turns off here to go to Little Rock.

Q. Where was the old main line of the Little Rock and Memphis track? A. Just on the same line.

Q. Mr. McAvoy, this line leading out to the right coming from Memphis as you leave the main line and belting the yards, so to speak, what do you call that?

A. The lead track.

Q. Does this map represent the condition of the track on the 6th of February, 1900?

A. Yes sir, it's the same print the yards were put in by.

Q. How far is the third switch, or the lead track, from the main line of the Little Rock and Memphis road, or the main line as it now exists?

A. I don't know exactly, I would judge it to be about 100 feet. The first tracks are about 75 or 80 feet apart.

Q. Now how far are these tracks apart?

A. Fourteen feet from center to center.

Q. That would make about 100 feet from the main line to the switch on the third track?

A. Yes sir. That is, direct across; not from the switch, but direct across.

Q. This map represents the yard at the time the accident occurred? A. Yes sir.

Q. On these several tracks I see the words "capacity 36 cars", "capacity 37 cars", etc. Explain to the jury what that means?

A. That means the number of cars that they will clear between the switches?

Q. How thick is a tie?

A. Why, our standard ties are 6x8. Six inches thick and 8 inches wide.

93 Q. What kind of switch ties are those?

A. They are the regular standard ties. There are a few new ties, but they are towards this end. They are 7x9.

(Here defendant introduced map in evidence.)

Q. Mr. McAvoy, one more question about this map. I notice that along the lead track the word "frog" appears there. What does that indicate the position of?

A. That is the frog that allows the wheel to pass from one track to another.

Q. Does that indicate the position of a part of the switch?

A. Yes sir, that's a part of the switch.

Q. That is where the switch is located?

A. Yes sir, that is the back part of it.

Q. That is the part of it that the other tracks lead off?

A. No sir, they lead off from the head-block. The frog is used in crossing one rail with another.

Q. How far apart are those switches?

A. The leads of those switches are about 48 feet apart. That is from the head-block to the frog. I don't know exactly what the distance is from the head-block to head-block, but it is all the way from 60 or 70 to 100 feet.

Q. Mr. McAvoy, at the time the Choctaw, Oklahoma and Gulf Railroad Company took charge of this road, did they out in any other yards? A. Yes sir.

Q. At different places? A. Yes sir.

Q. Were those yards used in the same condition as this yard was used in?

(Plaintiff objected to the above question and the Court sustained said objection and refused to permit the witness to answer the question, to which ruling of the Court the defendant at the same time saved its exceptions.)

The blue print referred to in the foregoing evidence of A. McAvoy is attached hereto as Exhibit "A".

95 Joe Meyers, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Joe Meyers.
Q. What are you doing? A. I am running an engine.
Q. What were you doing on the 6th of February, 1900?
A. I was firing an engine.
Q. Do you remember the night that Tom Tennesse got his leg cut off in the yards at Argenta? A. Yes sir.
Q. What position did you occupy that night?
A. I was fireman.
Q. On the same engine that caused the injury?
A. Yes sir.
Q. Just state to the jury over there how that accident happened?
A. As we were coming into Little Rock Tom Tennessee was sitting on the seat in the engine back of me and was nodding. I touched him on the arm and said "we are in Little Rock now." He gets up and gets his lantern and gets off the engine and throws the switch to the lead track. He throws the second switch and the switch to No. 3 and, as we come in on switch No 3 he steps kind of to the middle of the track and as the engine approached him he tried to get on the step of the pilot and I suppose missed it and fell.
Q. Did you see him immediately after the accident?
A. When I heard him halloo I got my torch and jumped down. He was about five or six feet from the track.
Q. What did he say as to how the accident happened?
A. He says he slipped off the step.
Q. When did he say that?
A. About ten minutes after it happened?
Q. Did you examine that step?

95a A. Next morning I went and drawed some supplies and on my way back I stepped on the step and went up on to the pilot and filled the lights on the front of the engine and come down the same way and stepped on the step coming down and it was perfectly tight at 8 o'clock the next morning.

Q. Was it the same engine? A. Yes, sir.
Q. Same step? A. Yes, sir.
Q. Now, as the train goes into the yard what is the duty of the man who occupies the position that Tennessee did on that train?
A. His duty is to head the engine in and take the train into the clear and cut the engine off and take it to the roundhouse.
Q. Did he perform that duty that night?

A. He was just heading into the switch.

Q. He had already lined up the last switch? A. Yes, sir.

Q. Everything in that respect was complete?

A. Yes, sir.

Q. You were just heading in on No. 3? A. Yes, sir.

Q. At the time of the injury? A. Yes, sir.

Q. After Tennessee had thrown that switch and the train was heading in, what was the position for him to take in the proper discharge of his duty and what was the next duty that he would be required to perform?

A. Cut the engine off from the train.

Q. What position was he expected to take to perform that duty?

A. To catch the first car behind the engine or the rear of engine so as to cut the engine off.

Q. What position should he take to cut the engine off?

A. He should get on the step.

Q. What step?

A. The step on the back end of the engine.

96 Q. What back there for?

A. When we got into the clear to cut the engine off from the cars and take the engine to the round-house.

Q. Then, on this night, if Tennessee had been in the proper discharge of his duty he would have taken his position at the back end of the engine? A. Yes, sir.

Q. How many cars did you have on that train?

A. I don't remember, but I think we had something in the neighborhood of twenty.

Q. Were there any cars standing on the track that you were heading in on? A. No, sir.

Q. Was there plenty of room for the train to clear?

A. Yes sir.

Q. Did the headlight shine down there so that this fact was perfectly apparent? A. Yes, sir.

Q. Mr. Meyers, what is that step put there for?

A. It is put there to couple and uncouple the engine.

Q. Is it put there for any other purpose?

A. No, sir, not to catch engines or anything like that.

Q. Is there any rule of the Choctaw Railroad, or was there any in existence at that time, which directed head-brakemen to step up on this little step? A. No, sir.

Q. Was there any rule on the subject at all?

A. Yes, sir, a rule in the book of rules which says they must not catch the front end of an engine as it approaches them.

Q. How many trips had you made with Tom Tennessee?

A. That's the first trip.

Q. You left the morning before the accident?

A. Yes, sir, about daylight.

97 Q. How many times had you been in and out of this yard?

A. I don't know, about twenty times I reckon.

Q. Was the condition of these yards perfectly apparent?

A. I don't remember just exactly.

Q. I ask you if the condition of the track was apparent?

A. Yes, sir.

Cross-Examination.

Mr. Blackwood:

Q. Did you ever have a book of rules? A. Yes, sir.

Q. Have you got it now?

A. I haven't got it with me.

Q. When did you first get that book?

A. I got it, I think, in December or January, 1900.

Q. Just before the accident? A. About two months.

Q. Where did these books come from?

A. Mr. Robins gave me my book, the master mechanic.

Q. You don't know where they came from prior to that?

A. They were printed by the Choctaw, Oklahoma and Gulf but I couldn't say what place.

Q. When was your attention called to this rule?

A. Well, it never has been called just exactly at any time, only reading the book.

Q. Weren't you shown the book yesterday? A. No, sir.

Q. By Mr. Kilpatrick? A. No sir.

Q. When did you read it last?

A. It has been two months.

Q. When did you see a book of rules last?

A. I seen my book of rules last Sunday.

Q. Did you see a book of rules yesterday? A. No, sir.

Q. Did you talk with the attorney about this case?

98 A. Yes, sir.

Q. When? A. Thursday, I think it was.

Q. Didn't he show you the book then? A. No, sir.

Q. You say you were engineer on the night of the accident? A. No, sir, I said I was fireman.

Q. You have been promoted since? A. Yes, sir.

Q. You are engineer now? A. Yes, sir.

Q. How long have you been an engineer?

A. About four months.

Q. Did you ever see the head switchman get on this little step when he was coming into the yards? A. Yes, sir.

Q. If there had been other switches to throw, it would have been nothing unusual for him to jump on to this step and ride to the other switch?

A. Well, if he had had to do other duty there.

Q. But you claim he had no other duty?

A. No, sir, his next duty was behind the engine.
Q. If he had had any other duty he ought to have been back on the step? A. Yes, sir.
Q. Did this engine have any step in the rear?
A. I think it did?
Q. Don't you know that it didn't? A. I couldn't say.
Q. It was an old passenger engine, wasn't it?
A. Yes, sir, I think it was.
Q. Is it not a fact that these passenger engines don't have any steps behind?
A. Not on passenger engines, but I think this engine had a step on it.
99 Q. You would not swear to that positively?
A. No, sir.
Q. How far in on switch No. 3 had your engine gone at the time this man was hurt?
A. It was about ten feet from the points.
Q. What were you doing?
A. I was shutting the lubricator off.
Q. Which side were you on?
A. I was on the left hand side.
Q. He was on the right side? A. Yes, sir.
Q. You could not see him? A No, sir.
Q. Did you hear his halloo? A. Yes, sir.
Q. Did you get down to see him? A Yes, sir.
Q. How long did you stay with him?
A. About five minutes.
Q. Then where did you go? A. I got back on my engine.
Q. Where then? A. Went to the round-house.
Q. How far away was the round-house?
A. About a thousand feet.
Q. He was lying on the ground that night? A. Yes, sir.
Q. You stayed with him about five minutes, that is all you saw of him? A. Yes, sir.
Q. He was in great pain, wasn't he?
A. Yes, sir, he was in pain.
Q. He didn't undertake to say exactly how he got hurt, did he?
A. He only said when they asked him that he slipped off the step.
100 Q. Did you make a report to the company in writing? A. I signed the engineer's report.
Q. Did he undertake to describe how he got hurt?
A. No, sir.
Q. You say you only made one trip with him, that was all?
A. We went out of there about day-light the day before.
Q. You went over to Memphis and doubled back?
A. Yes, sir.

Q. You didn't get any sleep, did you, on that one trip, except what you stole?

A. Yes, sir, we got sleep at Hopefield, I think four or five hours.

Q. Then you doubled right back? A. Yes, sir.

Q. On this trip, Tom was asleep in your cab until you got in and then you woke him up? A. On the seat box in the cab.

Q. Then he got down and threw the switch to the head track and walked up to the third switch? A. Yes, sir.

Q. Then he threw the third switch and attempted to jump on this step on the front end of the engine? A. Yes, sir.

Q. Then it was that his leg was cut off? A. Yes, sir.

Q. Do you know when that was?

A. In February, I think the 6th.

Q. You went back there the next morning, you say?

A. Yes, sir, to the engine.

Q. About 8 o'clock? A. Yes, sir, about 8 o'clock.

Q. The step was good and tight?

A. Yes, sir, good and tight.

101 R. W. Harris, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. R. W. Harris.

Q. Do you remember when Tom Tennessee got his leg cut off in February, 1900? A Yes, sir.

Q. You were there that night?

A. I was flagging on the caboose.

Q. The same train? A. Yes, sir.

Q. Did you see him after the accident occurred?

A I guess about five or ten minutes after.

Q. Just explain to the jury in a brief way how that accident happened.

A. Well, I don't know anything about how it happened because I wasn't there when he got hurt. I came on with the same crew, I was flagging and we headed into the yard. After we come through the switch I had to close the main line switch and just as I got off the caboose to close the switch I heard some one scream and they stopped. I heard him halloo and supposed the engine had caught somebody and they had to back off of him. I got down and threw the switch so if we had to back out we could go through the switch, and came back and told the conductor I heard some one halloo.

Q. You went down there, did you?

A. No, sir, I stayed on the caboose until they started up again. We pulled the caboose down right opposite him and I got off and looked at him.

Q. Mr Harris, you are conversant with the duties of a brakeman, are you? A. Yes, sir.

Q. Did you have a book of rules? A. Yes, sir.

102 Q. After Tennessee had thrown that third switch and headed in on the last track, where was his place and what was his next duty?

A. His duty was to be on top of the car where he could see the engineer so that when we got the train in the clear he could cut the engine off and take it to the round-house.

Q. Did you leave the train on that track? A. Yes, sir.

Q. Were there any cars in front of you? A No, sir.

Q. Is there any rule of the company that requires a head-brakeman to stand in front of the engine and attempt to step on that step as the engine approaches them? A. No, sir.

Q. What is the rule in that respect?

A. In case of doubt take the safe side and stop them, run no risks.

Q. If a brakeman has any duties to perform on that step, he has a right under the rules to stop the engine?

A. He can stop the train, yes sir.

Q. Until he gets on? A. Yes, sir.

Q. Do you know of that being done on the road?

A Yes, sir.

Q. It is done, is it? A. Yes, sir.

Q. Is it not regarded as dangerous by railroad men for a man to attempt to step on one of those small steps when the train is in motion? A. Yes, sir.

Q It is regarded as dangerous?

A. Yes, sir, it is dangerous. You must use signals and stop them.

Q. Now, on a night like that when it was dark and had been raining all day, would you regard it as any more dangerous?

A. It is dangerous any time, being slippery it would be more dangerous.

103 Cross-Examination.

Q. You are a brakeman now? A. Yes sir.

Q. On the same road? A. Yes sir.

Q. Been a brakeman ever since the 6th of February for that road?

A. I was flagging then. As soon as they put on white brakemen I went to braking on the first crew.

Q. How long after this accident?

A. I couldn't say, not very long, I don't think more than a month or two.

Q. After the accident? A. Yes sir.

Q. What had you been up to that time? A. A flagman.

Q. Did you ever brake?

A. I never had broke any then, I mean I never broke regular.

Q. You had never followed the business of braking?

A. Not until after this accident.

Q. When the train is moving very slowly, it is not dangerous to step on that step is it?

A. Yes sir, it is dangerous to step on that step any time unless you stop them. You can use signals and stop them.

Q. If the step is in good order and the train barely moving just along so it could stop in 8 or 10 feet, isn't it perfectly safe?

A. No sir, you are liable to slip off of it any time.

Q. You can get on it, but you are liable to slip off?

A. Yes sir.

Q. Is it not a fact that it is grooved to make it rough so you cannot slip off if it is in good condition?

A. You can slip off of it, you are liable to miss it.

Q. Are there not such grooves?

A. Yes sir, it is grooved that way.

104 Q. If it is in good order, there is not much likelihood of your foot's slipping, is there? A. Yes sir.

Q. Right there on that rough piece?

A. You are liable to get overbalanced if you don't slip.

Q. It is as wide as a man's foot, isn't it?

A. Yes sir.

Q. You have seen brakemen jump on it? A. Oh, yes.

Q. Now, if there had been another switch to throw down below there, it would have been his place to be on there, wouldn't it? A. No sir.

Q. If there had been another switch?

A. If there had been another switch he could get up at the gang way, or he could have stopped them and got on it there.

Q. Is it customary for the head brakeman to ride in front and throw the switches before taking the engine into the yards? A. No sir.

Q. Do you know what the customary way was at the time this accident occurred? You were not a brakeman, were you?

A. No sir, but I had a book of rules.

Q. Do you know what the actual custom was for brakemen to do before the 6th of February, at the time of this accident?

A. Yes sir.

Q. How do you know that?

A. I had a book of rules that told.

Q. You were not a brakeman, were you? A. No sir.

Q. You were a flagman? A. Yes sir.

Q. How do you know what the custom was?

A. I had the book of rules.

Q. That's all you know, the book of rules?
A. I know the book of rules, I know the custom of brakemen to go in there I could see them.
105 Q. Their duty was to jump on that back step and ride in there? A. Yes sir.
Q. Is that the rule?
A. It is something similar to that, yes sir.
Q. Is not the whole business of a brakeman a risk?
A. Well, yes, it is risky in one way, but in another way it is not risky.
Q. Is it not a dangerous business to follow?
A. Well, not if you work careful.
Q. And never go near a car?
A. Yes sir, you go near a car all right. Accidents will happen to anybody.

Redirect Examination.

[—] Mr. Harris, you were working with brakemen over there, weren't you? A. Yes sir.
Q. You were expecting to become a brakeman?
A. Yes sir.
Q. In order to become a brakeman what did you have to do?
A. I have to help the brakemen do the work. I was on a local and helped unload the local and helped do the switching.
Q. I mean preparatory to becoming a brakeman?
A. I don't quite understand.
Q. What did you have to do in the way of preparation?
A. Well, I had to help do the switching whenever we had to do any switching. I had to cut off the cars if there were any cars to be cut off and I would ride in and couple them up.
Q. Well, I mean in the way of learning what the duties of a brakeman are.
A. I had a book of rules to tell me what to do.
Q. You had been studying that book of rules, had you?
A. Yes sir, I had read them more or less.

106 Hilliard Graves (colored), being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Hilliard Graves.
Q. Where do you live? A. Argenta.
Q. Do you know Tom Tennessee? A. Yes sir.
Q. Where were you on the night of the 6th of February, 1900? A. I was brakeman for the Choctaw.
Q. Do you remember when Tom Tennessee got his leg cut off? A. Yes sir.
Q. Where were you at the time?

A. I wasn't right there, but I got there directly after it was done.

Q. Were you on the same train? A. Yes sir.

Q. What was your position on that train?

A. I was swing-brakeman.

Q. How long was it after Tom got his leg cut off until you saw him?

A. It was not five minutes, about three minutes, the time I could go four car lengths.

Q. Did you have any talk with him about how it occurred?

A. Yes sir.

Q. What did he say was the cause of it?

A. He said he attempted to get on the foot-board of the pilot.

Q. Just tell all he said.

A. He said he tried to get on the foot-board of the pilot and fell.

Q. Did he say what was the cause of the fall?

A. He just said that night he was trying to get on the foot-board and fell.

Q. Did he say what caused him to fall? A. No sir.

107 Q. Did he tell you that at any time that night?

A. He told me that he was trying to get on the foot-board and fell.

Q. How long have you known Tennessee?

A. I have known him since 1893.

Q. How long had he been working for this road?

A. I think he went to work in December.

Q. Do you know how many trips he had made over the road?

A. That was the second trip with me. We went out together in December on the first No. 9 that went out. I [—] taken sick with the small-pox directly after that and went to the hospital. I didn't come back again till about the first of February, and then I left here with him on the night of February 5th.

Q. In December, when you went out, did you leave from the new yards? A. We come in here from Memphis.

Q. Did you come into the new yards?

A. Yes sir, come into the new yards.

Q. That was in December? A. Yes sir.

Q. What were they doing over there at that time?

A. They were putting in new tracks.

Q. Did you know that there was a new yard over there?

A. Yes sir, I lived right across from it.

Q. They were putting in new tracks? A. Yes sir.

Q. Did you know it from coming in on the trains or from living over there?

A. I knew it from living over by there. You see in December was the first trip I had been out since way up in the spring because I had been sick with rheumatism. I had made a trip that December, that was the first trip I had made, until lately, since March in the following spring.

Q. Were you on that step any time that day?

A. I remember getting on it once at Palestine.

108 Q. Is that east or west of Little Rock?

A. That's east of Little Rock.

Q. What occasion did you have for stepping on it?

A. We generally step on it to ride in. We were heading in.

Q. Did you get on there to make a coupling?

A. I got on there to ride in and make a coupling. We were heading in for the passenger train.

Q. What was the condition of the step at that time?

A. Well, it looked all right to me at that time.

Q. Did it feel all right?

A. I didn't pay much attention to it.

Q. Where was this step?

A. There was one on the left hand side and one on the right hand side.

Q. Don't you know that there is no step except on the right hand side of an engine? A. I think there were two.

Q. Are you positive?

A. I am not positive, but I think there were two on there.

Q. Which one did you step on?

A. The right hand step.

Q. Was that step in apparently sound condition?

A. Seemed to be to me, I didn't ride there far. I never make a practice of getting on the pilot.

Q. Why? A. It looks dangerous to me.

Q. Is it regarded as dangerous?

A. It ain't by everybody, but it is to me.

Q. You always avoid it? A. Yes sir.

Cross-Examination.

Q. Had you been warned by your brother not to get on that step?

A. Yes sir, he told me about catching on the step in front of an engine that way.

109 Q. Did he tell you that that step was in a bad condition?

A. Why, he told me that none of those steps were safe to get on, No. 5 and other small engines.

Q. Did he caution you about that particular engine, No. 5?

A. That was the first day we came out on No. 5.

Q. Didn't he warn you not to step on No. 5?

A. I was warned to be cautious about getting on all of those pilots.

Q. Didn't you say awhile ago that you were warned especially about No. 5?

A. Yes sir, he warned me about all of those small engines, and more particularly about these larger engines. That No 5 was a new engine, that was the first time I ever seen that engine or handled it, to be on a train with it.

Q. You are an extraordinary careful brakeman?

A. Yes sir, I am careful.

Q. How long have you been working for the Choctaw Railroad? A. For a long time, ever since 1892.

Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride, isn't it?

A. Yes sir.

Q. If an engine was moving at a slow rate of speed, it is not very dangerous, is it? A. No sir.

Q. It is not dangerous?

A. No sir, unless a person's scared of it, it's like playing with fire, it is liable to hurt you.

Q. You didn't see Tom hurt? A. No sir.

Q. You say that he said that he jumped on this step and was hurt? A. That's what he said.

Q. He was suffering a great deal and didn't talk much?

A. No sir.

Q. You didn't worry him much about the details?

A. No sir. I just helped to carry him to the hospital.

110 Q. You didn't ask him whether it broke or not?

A. No sir, only I asked him how he got hurt.

Q. How long did you say you had been working for this road?

A. I went to work the 13th day of September, 1892. That was my first trip.

Q. How long had you worked before the 6th of February?

A. I was employed by the company from along in October, 1897, up to that time, I had been off between.

Q. Do you know the general custom as to head-brakemen riding into yards? A. Yes sir.

Q. Was it customary for the head-brakeman to jump on this step on the pilot and ride into the yards to line up the switches?

A. Yes sir, we always thought that was our duty.

Q. You were not head-brakeman, were you? A. No sir.

Q. How many brakemen were there on that train?

A. I think there were three.

Q. You say you have known Tom Tennessee a considerable time? A. Ever since 1893.

Redirect Examination.

Q. Are you employed by the company now? A. No sir.
Q. How long has it been since you worked for them?
A. About the 24th or 25th of February of last year.
Q. You were discharged right after this accident?
A. Yes sir.

Recross-Examination.

Q. What are you doing now? A. Nothing at all.

111 S. H. Barnes, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. Mr. Barnes, what position do you occupy now?
A. With the Choctaw, Oklahoma and Gulf. I am trainmaster.
Q. What position did you occupy with them in February, 1900?
A. I was acting as train-dispatcher, working from midnight up until 8 o'clock a. m.
Q. How long have you been connected with the road?
A. With the exception of May and a part of June of last year, I have been with the Choctaw continuously from the 5th of January, 1900.
Q. In the trainmaster's office? A. Yes sir.
Q. What are the trainmaster's duties?
A. He has charge of all employes in the operating department, that is train, engine, station and yard service. He has general supervision of the handling of trains.
Q. Mr. Barnes, when a freight train comes into the yards I wish you would explain to the jury what the duties of the head-brakeman are?
A. Ordinarily his duties are to turn the switches leading into the yard and find a clear track for his train. The track leading from the main track to the yard we call the lead. Off of this lead there are various tracks where trains may enter and stand until we can further provide for them. The head-brakeman should open the main line switch and find a clear track leading from the lead, and see that there is nothing in front of his train, and to direct the engineer to run in until all of his train is in.
Q. In performing this duty is it necessary at any time for the brakeman to stand in the middle of the track and attempt to put his foot on the little step in front of the cow catcher when the engine is moving toward him? A. No sir.
Q. What should he do in a case of that kind?
112 A. If it is necessary for him to couple to some cars, he should signal his engineer to come ahead until he

gets within a few feet of the car he wishes to couple to, and then stop him and get on the step and make the coupling. We instruct them not to get on the front end of an engine while it is moving.

Q. If the train should go into the yards and the brakeman should get down and find a clear track and line up the switch so that the engineer could head in on that switch, where would be his place and what would be his duty immediately following that?

A. When the track is clear he should get on top of some car near the head of his train where he could see a signal from the rear of the train and transmit that signal to the engineer so that the engineer may know when his train is in the clear. Then he should stop when the train is in the clear and the head-brakeman should cut the engine off and permit it to go to the round-house. Sometimes the head-brakeman is required to take the engine to the roundhouse and sometimes the yard-master is required to take it.

Q. Is there any rule of the Choctaw, Oklahoma and Gulf Railroad Company, that was in force in February, 1900, that required a brakeman to stand in front of the engine and attempt to step on the pilot as the engine was moving toward him? A. No sir, there is a rule which prohibits them.

Q. Is it considered a dangerous practice to step on this step?

A. With a road engine it is. I mean by a road engine a freight engine, an engine that has a pilot. The yard engine is provided with a step.

Q. Just explain to the jury the difference between a switch engine and a road engine.

A. A switch engine has no pilot, or cow catcher as it is sometimes termed, but has a step which is perhaps six inches above the rail, fastened to the front end of the engine?

Q. Go ahead, Mr. Barnes.

113 A. Well, the switch engine has a step about six inches above the rail, there is one on each end of the engine. This front step hangs from what is known as the pilot beam and above this pilot beam is a hand-hold so that the switchman riding back and forth can stand on this step on each end of the engine holding on the hand rail; and while the railroad company does not permit them to get even on the yard engine while it is in motion—that is the rule—as a matter of fact the switchmen do it more than the roadmen with the road engines. The road engine has a pilot or cow catcher and no hand-hold to catch hold on and sometimes hasn't a step of any description. Ordinarily it has a small step on the bottom of the pilot, three or four inches wide. It is there for use when it is necessary to make what is known as the pilot-bar

coupling; and when the engine is supplied with an old style pilot-bar the brakeman, if he does as he should, will stop his engine within two or three feet from the car, then step on the step, pick up the bar, hold it up and when it enters the coupling of the car, signal his engineer. That is what that step is for.

Q. Is that step for any other purpose?

A. Nothing that I can think of. After the step is made we might use it to pass backward and forward over the pilot bar, or to reach over and get hold of the airhold.

Q. But that is the purpose of the step, to make pilot-bar couplings, is it?

A. Yes sir, the only other purpose is that the engineer might want to climb up on the front of his engine. He could then stand on there to see his draw bar.

Q. But there is no purpose for which that step is constructed which requires a brakeman to step on it when the engine is moving towards him?

A. No sir, he should not step on it when the engine is moving towards him. If he does not have to make a coupling he should get on the side of the engine. Steps are provided for that purpose on the side near the cab.

114 Court: After a man has thrown the last switch going into a yard, has he any duty to perform which requires him to get on in front?

A. None whatever, unless there is a car in front which it is necessary to make a coupling to, but then he should only get on the front end of the pilot after he has made the stop close to the car in order to enable him to pick up the bar.

Court: But if there is no car in there and he is simply going into the yard, is there anything whatever he should do there?

A. He should not be riding on the engine at all, he should get on top of a car in behind the engine to receive and transmit signals back and forth from one end to the other.

Cross-Examination.

Q. Where was your office at that time?

A. It was in Little Rock. I don't remember whether it was in the old office building or the depot, but I think it was in the old infirmary that we use for offices.

Q. How long had you been train dispatcher?

A. For this company just about thirty days at that time.

Q. What had been your position prior to that?

A. Previous to that I was employed on the St. Louis and San Francisco on the Paris Division as brakeman, and previous to that I was connected with various roads in Colorado as train dispatcher and trainmaster.

Q. Then as a matter of fact you had been employed by this company but thirty days before this accident?

A. Yes sir, thirty days.

Q. Where was your office?

A. It was in Little Rock proper in what is known as the General Office Building, which is close to the depot.

Q. That is on this side of the river?

A. At Second and McLean streets, yes sir.

Q. You never went out to instruct the men in person, did you?

A. No sir, that was not my business as train dispatcher.

Q. Your business confined you to your office on this side the river?

A. Yes sir, a man working as train dispatcher has no duties except office duties.

115 Redirect Examination.

Q. Your duties as train dispatcher, though, required you to be very familiar with all the rules and practices with reference to the operating department?

A. Thoroughly familiar; a train dispatcher frequently, and on some roads altogether, examines train and engine men and instructs them in their duties.

Q. A train dispatcher really takes the place of the General Superintendent in a good many things?

A. A train dispatcher, on duty, or what is known as a trick dispatcher, handles everything that may come up at any time. He refers matters that require action by some one in authority when he can reach them; but, for instance, a man working from midnight until 8 o'clock in the morning is the only man on duty at that time of night, and he handles anything, no matter what department it comes up in.

Q. So that at that time you were just as familiar with the rules, practices and customs of the road as you are now?

A. As I am now.

Q. I mean at the time you had been on the road.

A. With the rules, yes, sir, with the rules and practices of the road, certainly; but I was not as familiar with the physical condition of the road as I am now.

116 .... McKeiser, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What position did you occupy on the 6th of February, 1900, Mr. McKeiser?

A. I was machinist in the round-house.

Q. What duties did you have to perform as machinist?
A. It was my duty to repair all engines that came in.
Q. Do you remember the time Tom Tennessee got his leg cut off in the yards over there? A. Yes, sir.
Q. Did you do any repairs on Engine No. 5?
A. Yes, sir.
Q. When did you make those repairs?
A. I made them when I worked on the engine.
Q. I mean after the accident occurred.
A. Well, I worked on the engine as near as I can remember about six or seven hours.
Q. How long was that after this accident?
A. I don't remember.
Q. The next morning? A. Yes, sir.
Q. When you went to your duties? A. Yes, sir.
Q. Did you make any repairs on the step of the engine?
A. No, sir.
Q. Did you make all of the repairs?
A. Yes, sir, with two helpers.
Q. They were under your supervision? A. Yes, sir.
Q. When did you make any repairs in the step, if any?
A. I don't remember ever making any repairs on that step.
Q. Didn't make any on that step at all? A. No, sir.
117 Q. Make any a few days after this accident?
A. No, sir.
Q. A few days before? A. No, sir.
Q. What was the condition of the step apparently?
A. It was in very good condition.
Court: Was it properly fastened? A. Yes, sir.
Court: Was it loose in any way? A. No, sir.
Court: Was it perfect?
A. Yes, sir, as far as I could see perfect.

Mr. Peirce:
Q. Your exclusive business was to work on those engines?
A. Yes, sir.
Q. Did you have anybody else?
A. When there was a rush of work sometimes.
Q. I mean at that time? A. No, sir.
Q. Then you can say that whatever work was done on it was necessarily done by you? A. Yes, sir.

Cross-Examination

Q. What was your position in the machine shop?
A. I was machinist, working in the round-house.
Q. Who had charge of it?
A. Mr. Robkins was the master-mechanic.
Q. Were you running the shop? A. No, sir.
Q. Who was? A. Mr. Robkins.

Q. How many men did you have?
A. Altogether—I suppose you want to know all that were connected with the round-house?
118 Q. How many machinists?
A. No other machinist except me.
Q. You undertake to say that you did all the repairing for the whole road? A. All the machinist repairing, yes, sir.
Q. Did anybody else do anything?
A. No other machinist work.
Q. How many men were employed in there?
A. Probably twelve or fifteen.
Q. Do you undertake to say that they didn't do any work on the engines? A. No, sir, not any of the machinist work.
Q. Suppose a step was securely fastened and then became loose, would it take an experienced machinist to perceive that? A. That was a part of my duty.
Q. You were to make the repairs of the whole road?
A. No, sir.
Q. Who else helped?
A. I had a couple of darkies helping me.
Q. Where are they?
A. One of them is at the round-house yet.
Q. Where is the other? A. I don't know.
Q. Where did you take charge of this engine the next day?
A. Early in the morning.
Q. How early? A. After 7 o'clock.
Q. Was that the first engine you overhauled?
A. I don't remember now.
Q. You worked on it six or seven hours? A. Yes, sir.
Q. Did you make any record of your day's work in the shop?
A. Only the record book, which tells how long I worked on it.
Q. You worked on it six or seven hours?
A. Yes, sir.
119 Q. How came you to examine that particular step?
A. I usually examine the whole engine, go over and make a careful inspection of the whole engine.
Q. Did you have any reason to examine that particular step? A. No particular reason.
Q. There was no complaint about it, was there? A. No sir.
Q. But you went to it the first thing in the morning?
A. No sir.
Q. How did you examine it?
A. I took a casual glance at it.
Q. You had no particular reason to examine it?
A. No sir.
Q. You couldn't say you went to it the first thing?

A. No sir.
Q. Can't you tell about what time you examined it?
A. No sir.
Q. How long after you went to work was it before you took charge of this engine?
A. I don't know that, I am sure.
Q. How do you know you worked six or seven hours on it?
A. I know by how much I had to do on the engine.
Q. When did you finish it up?
A. About 4 o'clock in the afternoon.
Q. How long were you off at noon? A. One hour?
Q. From 12 to 1? A. Yes sir.
Q. Have you examined your record as to whether it shows what time you commenced to work on the engine? A. No sir.
Q. Would that record show it?
A. Only as to how much time I put on it.
Q. It wouldn't say what time you began? A. No sir.

F. C. Weaver, being duly sworn, on behalf of the de-
120 fendant testified as follows:

Direct Examination.

Q. Mr. Weaver, what were you doing in January or February, 1900? A. I was running a freight train.
Q. Where from?
A. From Little Rock to Memphis, Hopefield rather.
Q. Do you know Thomas Tennessee? A. Yes sir.
Q. Did he ever make any trips with you?
A. Yes sir, one trip.
Q. Where did you leave from on that trip?
A. We left from North Little Rock, from the new yards over there.
Q. When you came in, where did you go?
A. Into the new yards.
Q. What position did Tom Tennessee occupy on that train?
A. He was head-brakeman.
Q. Do you remember how much of the lead track you had to pass through on that trip? A. No sir, I do not.
Q. You went in on the lead track first? A. Yes sir.
Q. What time did you leave and what time did you get in?
A. I left at 6:55 and arrived back at 12:05 in the afternoon.
Q. Was the condition of those tracks apparent to any one going in there on a train? A. I suppose so.
Q. There is nothing to prevent any one from seeing the condition, is there? A. No sir.
Q. You say Tom Tennessee was head-brakeman, where should he be on a train?
A. It is the head-brakeman's duty to throw the switches in front of the engine, and head into the yards. Next after he

does that, then he gets on top of the train, that's the
121 proper position until the rear of the train is all pulled into the yard.

Cross-Examination.

Q. You say you made one trip with Tom? A. Yes sir.
Q. What date?
A. December 20th we left here, and arrived back the 22nd.
Q. You left at 6 o'clock? A. At 6:55.
Q. Was that day-light?
A. I don't remember, it was in December.
Q. Did you have to use lanterns?
A. I don't remember that. Of course, I only know what time we left from the record of our trip.
Q. The train was all made up and you and Tom took charge of it and went out? A. The train was made up.
Q. The crew had nothing to do with making up the train, did they?
A. Nothing except coupling the engine on. We brought the engine up from the round-house and put it on the train.
Q. What time did you get back?
A. 12:05 in the day-time.
Q. When you got your train in, you could go right off to your boarding house? A. Yes sir.
Q. You didn't have to do anything with the train, you left the cars right there after you got in?
A. Yes sir, the only thing we do is to cut the engine off.
Q. That's the only trip you made with Tom? A Yes sir.
Q. He was head-brakeman, you say? A. Yes sir.
Q. Is that the most important brakeman on the train?
A. Not necessarily.
Q. One of the most important?
A. Well, I don't know that his duties are more im-
122 portant than any other. There is no rule about that.
Q. He generally rides in on the front of the engine when he is coming into the yards like those in Argenta, doesn't he?
A. He has no business on the engine until the train stops. Then it is his duty to get on there.
Q. I asked you if, when coming into the yards, his business is not at the head of the engine?
A. Yes sir, it is his business to go ahead of the engine and throw the switches.
Q. After he has thrown the last switch, if there is any cars to be coupled on in front of the engine, he still stays in front?
A. Yes sir, if he has to couple on to a car.

123 I. M. Wightman, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What are you doing now?
A. I am general yardmaster of the Choctaw.
Q. Whereabouts?
A. For the Choctaw, Oklahoma and Gulf, both sides the river.
Q. Here at Little Rock? A. Yes sir.
Q. How long have you been with the Choctaw?
A. Ever since 1894.
Q. Did you occupy a similar position before you came here?
A. Yes sir, at Shawnee.
Q. What are your duties in that position?
A. I handle the crews in and out
Q. When a crew is coming in from a trip, explain to the jury what the duties of the head-brakeman are, and where he should be in the performance of those duties?
A. In coming into the yard, the head-brakeman should turn the switches in front of the engine. If the track is clear he leaves the cars there, but if there are any cars in front of him he should couple to them and push them on until the train is in the clear. Then he should cut the engine off and take it to the round-house.
Q. After he has turned the last switch and the engine is headed in, what is his duty and where is his position?
A. He is supposed to get on top where he can see what is going on.
Q. On top of what?
A. On top of a car behind the engine where he can be seen from the rear end.
Q. Where is that? A. The car is behind the engine.
Q. Why do you say he is required to be there?
A. So he can see what is going on, if everything is all right, and so he can signal the engineer when the train is in the clear.
124 Q. In the dicharge of his duty, is the head brakeman coming into the yards—is there any duty for him to perform which requires or is necessary for him to stand in front of the moving engine and attempt to step on that small step attached to the cowcatcher?
A. No, sir, there wouldn't be unless he is heading on to a car.
Q. Then what is his duty?
A. When it comes up to the car he is supposed to get in front and make the coupling.
Q. How near the car?
A. Well, I don't know exactly. As a general thing he gets on at 10 or 15 feet from the car.

Q. He is supposed to get on the step at 10 or 15 feet to make a pilot bar coupling? A. Yes, sir.

Q. And if there is no car on the track which he is heading in on, is it necessary or proper for him to jump on that pilot?

A. No, sir.

Q. Is there, or has there been since you have been connected with the company, any rule that requires a head-brakman or anyone else to step up there in front of the pilot when the train is moving toward him.

A. None for him to do it.

Q. Are you familiar with the different switches over there? With that switch where Tom Tennessee got hurt?

A. I couldn't tell, I don't know where he got hurt.

Q. Do you know where the third switch is? A. Yes, sir.

Q. How many switches are there?

A. There are eight tracks.

Q. You know the location of the third switch, do you?

A. Yes, sir.

Q. After the head-brakeman turns the last switch that will head the train in on that track, is there any other switch for the brakeman to turn below there?

A. No, sir, not on that lead.

125 Cross-Examination.

Q. If there hadn't been room on that switch, wouldn't he have to throw a switch down there to let the train in on the lead track?

A. If there wasn't room at the lower end, it is owing to how many cars it will hold. That switch will hold 37 cars.

Q. If there had not been room on that third switch, wouldn't the head-brakeman have to throw two or three more switches down below? A. One.

Q. Wouldn't he have to throw the switch where No. 3 joins on to the lead? A. Yes, sir.

Q. And he might have had to throw No. 4?

A. Might have had.

Q. Then when he came on over, the next switch, the cross switch? A. No, sir, we go into the round-house then.

Q. He would have to throw that wouldn't he?

A. It wouldn't be necessary for him to, it was either thrown for the round-house or the other leads.

Q. It depended entirely as to what his duty was whether that switch was long enough to hold the train, didn't it?

A. Well, it is not necessary, he shouldn't have got on the front end to ride 37 car lengths.

Q. I am talking about his duty in throwing switches.

A. Well, it wouldn't be necessary for him to go through it. If it didn't hold him, he would double over on the other track.

Q. Suppose there had been other switches to throw, for instance if he had gone in on No. 3, and he didn't know that it would only hold 15 cars and he had 30, he couldn't have told whether he had the other switches to throw or not?

A. He should wait and see until he got a signal from the rear end and pull in as far as he could.

Q. In that case there would have been more switches to throw? A. Yes, sir.

Q. You have been in the employ of this road since 1894?

A. Yes, sir.

126 Q. You came down from the west division?

A. Yes, sir, I came from Shawnee.

Q. I will ask you if when a man gets on the front end of the engine to make a coupling if he doesn't get on 12 or 15 feet before it comes up to the car?

A. Yes, sir, generally and places his pin on to the car he is coupling to.

Q. Then as a matter of fact they usually get on this pilot before the engine stops entirely?

A. There has been a rule that they couldn't do it.

Q. I am not talking about the rule, is it not a fact that they do do it? A. Yes, sir, some men do.

Q. Is it not a common thing for them to jump on this step 10 or 15 feet before they come to a stop?

A. If they are going very slow.

Q. If they are going slow, is it safe?

A. Sometimes it seems not to be, but a man takes his chances.

Redirect Examination.

Q. Mr. Wightman, I don't think you understood Mr. Blackwood's question about coming in on that track. Look at this map. Here is the track. Coming in from Memphis here is Track No. 3 there. On that Track No. 3 it shows that the capacity is 41 cars. Now, if the head-brakeman turns the switch and heads the train in on No. 3 which has a capacity of 41 cars and there are no other cars on that track, what is the duty and where is the position of the head-brakeman?

A. Aftr lining up the third switch, he should get on top, as I said, to see that his train is following him.

Q. It is his business to get on top of the first or second car behind the engine?

A. Yes, sir, that's the way I answered.

Q. Then has he any business, for any purpose, to ride on the front end of the engine?

A. He should not, he has none.

127 Q. Would that be an improper discharge of his duty under circumstances of that kind? A. It would.

Q. If he had gone in on Track No. 3 and found that there was not room and he had gone in on Track No. 4, who would have to throw that switch and who should attend to that switch that leads in from the lead track?

A. The rear brakeman.

Q. Then the head-brakeman has nothing further to do until the engine has backed out of track No. 3 and gone back on the lead track and then down the lead track to the next switch?

A. I don't quite understand.

Q. Then they come down there and double over?

A. Yes, sir.

Q. Then, even in that case, before he turned the switch these cars would have to be cut?

A. No, sir, he would have to open that switch and pull up here until the hind end man gave him the signal to be in the clear.

Q. If he comes in on track No. 3 and they have to double over, and there is no cars on the track, you say it is his business to get on the car behind the engine to see that the train follows in on the track; and then when they find that they have to double over it is his business to get down and open this switch?

A. Yes, sir, and pull on up until the rear man gives his signal to stop.

Q. If a brakeman were sitting on the front end of the engine could he see a signal from the rear end of the train?

A. No, sir.

Recross-Examination.

Q. Couldn't the swing-brakeman give the signal then?

A. No, sir, the track is on a curve, he couldn't see it.

Q. It is not on much of a curve, is it?

A. It's on a pretty good curve.

Q. Wouldn't the swing-brakeman have been the proper man to give the signal?

A. All brakemen when pulling in on a side track are supposed to be on top.

128 A. H. Kilpatrick, being duly sworn, on behalf of the defendant testified as follows:

Mr. Peirce:

Q. What is your name? A. A. H. Kilpatrick.

Q. Do you know Tom Tennessee? A. Yes, sir.

Q. Did you have any talk with Tennessee about the accident resulting in his leg's being cut off? A. Yes, sir.

Q. How long after was it?

A. Since he got out of the hospital.

Q. How did he tell you it happened?
A. He told me he went to get on the pilot and slipped.
Q. Did he tell you the step gave way and he fell?
A. No, sir.
Q. Never did? A. Never did.

Cross-Examination.

Mr. Blackwood:

Q. You are the claim agent, aren't you? A. Yes, sir.
Q. You went to Tom to pump him about this accident, didn't you? A. No, sir, he came to my office.
Q. You wrote down what he told you? A. No, sir.
Q. Didn't you have a stenographer there to take down what he said? A. No, sir.
Q. Did you ever make a statement to the attorney?
A. No, sir.

Redirect Examination.

Mr. Peirce:

Q. Is it not a fact that the only statement we have at the office from Tennessee is the one Mr. Vaughan furnished?
A. I don't know, Mr. Peirce, I never took one from him myself, I don't know if there is.

129 Charles Robkin, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination

Q. What is your name? A. C. Robkin.
Q. What were you doing in February, 1900, Mr. Robkin?
A. In February, 1900, I was master mechanic for the Choctaw, stationed at Argenta.
Q. Do you remember the time Tom Tennessee got his leg cut off? A. Yes, sir.
Q. Where were you at that time?
A. I was at my office in Argenta.
Q. Is that at the round-house?
A. It is close to there.
Q. Were you there when the engine came in?
A. Yes, sir.
Q. Were you informed of this accident at that time?
A. I was informed of the accident when the engine rolled into the round-house.
Q. Were you informed how the accident occurred?
A. Yes, sir.
Q. What inspection did you make in view of the information you had received?
A. I looked over the pilot. The accident was from that part of the engine.
Q. Did you examine the step? A. Yes, sir.

Q. What was the condition of the step?
A. The step was all right.
Q. Sound, was it? A. Yes, sir.
Q. Are you in the employ of the Company now?
A. No, sir.

Cross-Examination.

Q. What business are you in now?
A. The meat business.

Defendant rests.

130 Whereupon, the plaintiff, to rebut the evidence of the defendant, introduced the following testimony, to wit:

Thomas Tennessee, being recalled, testified as follows:

Direct Examination.

Q. It has been stated here that after you threw the switch for No. 3 you had no further business on the end of the pilot. Just state to the jury what, if any, business you had after you threw the switch and started to go on.

A. Why, I didn't know how long the track was and didn't know whether it would hold the train or not. Didn't know the length of the track and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches.

Q. How many other switches were there that you might have had to throw if this No. 3 had not been long enough to contain your train? A. Possibly three or four.

Q. What switches were they?

A. There was the lead switch to No. 3. I would have had to throw it because it was always lined up with the cut-off switch; and possibly to No. 4 track or No. 5. Probably the switch might have been headed into the round-house track and I wouldn't have wanted to go over there.

Q. You testified here yesterday that that was the first time you were ever in on this No. 3 track?

A. Yes, sir, the first time I had ever put a train on No. 3 track.

Q. You say you did not know its length? A. No, sir.
Q. You did not know how many cars it would hold?
A. No, sir.
Q. What was the extent of your train?
A. I don't know exactly how many cars we had. We had a pretty good train though.

131 Q. Was it a through freight from Memphis?

A. It was not a through freight, it was a local freight, but we picked up all the cars that were coming that way. They said we were the only crew coming this way and we picked up everything that was coming. Had a pretty good train.

Q. At the rate of speed he was going, just tell the jury whether or not it was dangerous for you to try to get on there, apparently dangerous.

A. No, sir. With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still.

Q. It was stated that you were warned at Forrest City about getting on this step, and that you got on it at a great rate of speed.

A. Why, there wasn't any one said anything like that.

Q. Now, you have heard the testimony of Mr. Vaughan and Mr. Kilpatrick and Mr. Cuneo, and probably some others, that you said that you suffered this injury by slipping off of the step. Did you tell them that?

A. I told them, each and every one of them, every time they talked with me about it that I stepped on the step of the engine and it gave way with me and I fell off.

Q. You have heard the testimony of Mr. McAvoy about the condition of the yard, in which he stated that he thought most of the tracks were filled in. Was this track filled in at the place you were hurt?

A. No, sir, it was not filled in at the place I was hurt, for after I got hurt they set my lantern on the ties and I looked at them and there wasn't anything at all between the ties, just the ties lying up on top of the ground.

Q. Did you have ample time to observe it?

A. Yes, sir, I was as conscious as I am now.

132 Q. How long did you stay there?

A. I reckon I stayed there nearly an hour.

Q. With your lantern and had nothing to do except to look at it?

A. Yes sir, they tied a string around my leg and stopped it from paining me so much.

Q. Have you ever assisted in building new yards on railroads?

A. Yes sir, I have. I have helped put in about three or four yards to my knowledge.

Q. What was the extent of these yards?

A. Well, I helped to put in one yard which was a pretty good sized yard. It had about 23 or 24 tracks in it.

Q. Where was that? A. At Covington, Kentucky.

Q. How many others did you put in?

A. I helped to put in other yards in Kentucky. One pretty big one.

Q. How many switches did it have?

A. I don't know just exactly, but there was something like 25 or 30. It was a good big yard. A good big saw mill was there. And I helped in another yard there at St. Helena, Kentucky.

Q. How were these others fixed up before they were put in general use?

(Counsel for defendant objected to the above question because the same was incompetent, immaterial and irrelevant. Whereupon the Court asked the witness the following question:)

Court: A large yard, such as this, and where the ground is such as it is there, are freight trains permitted to run in before it is completed or not?

A. No sir, they are not allowed to go in.

(Counsel for defendant objected to each of the above question and answer because the same were incompetent, irrelevant and immaterial and because the proper foundation had not been laid to qualify the witness to answer said question. The Court overruled said objection, and the defendant saved its exceptions.)

Court: The question is not what was done in any one
133 yard, but do you know how yards of this kind are made and how they are managed? A. Yes sir.

Court: Can you state that freight trains are not permitted to go into a yard until everything is complete?

A. All that I ever seen. They would fill them in and have them ready for general use—until the tracks were filled in with gravel or something.

(Counsel for defendant objected to each of the above question and answer because the same was incompetent, irrelevant, and immaterial and because a proper foundation had not been laid to qualify the witness to answer said question. The Court overruled said objection, and the defendant saved its exceptions.)

Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them? A. No sir.

Court: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

(The Court rules that the testimony will be excluded unless further foundation is laid.)

Counsel for Plaintiff:

Q. You say you have had had experience in helping to build at least three yards? A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Well, two of them were larger, and one of them was about the same size.

Q. What was the difference in the ground or soil from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, soil like this? Or was it a rocky foundation? A. No sir, it was solid dirt.

Q. Dirt something similar to this over here where this yard was built? A. Yes sir, I suppose so.

134 Q. Have you had any occasion from your own experience in the railroad business to notice the drainage or settlement of dirt around the ties, how it affects the road when it is newly built, how it should be built in order for it to drain successfully and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it in with gravel.

(Counsel for defendant objected to each of the above question and answer because they were incompetent, irrelevant, and immaterial, and because the proper foundation had not been laid to qualify the witness to answer the said question. The Court overruled said objection and the defendant saved its exceptions.)

Court: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

(Counsel for defendant objected to each of the above question and answer because they were incompetent, irrelevant and immaterial, and because the proper foundation had not

been laid to qualify the witness to answer the said question. The Court overruled the said objection and the defendant saved its exceptions.)

Counsel for Plaintiff:

Q. There was something said about the use of a switch
135 engine. Do you know the difference between an ordinary engine and a switch engine? A. Yes sir.

Q. Is a switch engine practicable for heading from Memphis over here, a long distance, or is a switch engine just used about the yards?

A. The switch engine is only used in the yard, never used at all out on the road.

Q. When you speak of its having been the custom, as you did yesterday, of stepping on this front step with a view to making a coupling or with a view to unlocking the switches in advance of you, do you mean that that was in reference to switch engines proper or to engines that were coming into the yard from a distance like the one you were riding on?

A. I meant a road engine. An engine with a pilot to it. A switch engine hasn't any pilot.

Cross-Examination.

Q. You say that you observed the condition of this track that night after you were injured? A. Yes sir.

Q. And that is the time and manner in which you got your opinion that you are testifying from now? A. No sir.

Q. I am talking about the condition of that road-bed?

A. No sir, I looked at the track at that place where I fell.

Q. That was the time you got your information about the condition of that track—while you were there by the side of the track in an injured condition?

A. At that place there wasn't anything at all between the ties.

Q. That was the time that you got your information?

A. That was the time I seen there wasn't no dirt between them ties. I didn't see any; I looked good.

Q. You looked then, after you were hurt, to see if there was any defect in the road-bed? A. Yes sir.

136 Q. Which made the better light that night, the electric head-light or your lantern?

A. The electric head-light, of course.

Q. Made a better light than your lantern? A. Yes sir.

Q. What capacity were you engaged in while helping to make these yards that you testified about?

A. Well, one yard I worked in I worked a gang of men all the while, surfacing up the track and gauging it.

Q. You were never superintendent of a road?

A. No sir, but I was foreman.

Q. You were never civil engineer of a road? A. No sir.

Q. You were the foreman of a gang of men and you had to make their time, didn't you? A. Yes sir.

Q. You never took charge of a yard and had it laid out, did you? A. No sir.

Q. And you never started one from the beginning and worked on it until it was finally completed, did you?

A. I have seen superintendents.

Q. I am asking you what you have done, if you ever had charge of the beginning of the construction of a new yard and the ending of it?

A. I have never had the beginning of it, but I have had the ending.

Q. You just worked as a day laborer, didn't you?

A. I was foreman of a gang.

Q. Being foreman didn't amount to anything more than your keeping the time of the men to see whether they worked or not?

A. Yes sir, I had to see that the work was done properly, else I couldn't have held the job.

Q. You got your instructions from others, didn't you?

A. No sir, I got mine from working on the track.

137 Q. Do you mean to say that they just turned you loose and told you to do as you pleased?

A. No sir, I got my instructions from working —section foreman.

Q. You just instructed the men to do what you were instructed to have them do? A. Yes sir.

This was all the testimony in the cause on both sides.

138 And this was all the testimony given in the cause on both sides. The defendant thereupon asked the Court to instruct the jury as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

The Court refused to give said instruction and defendant, by its counsel, then and there duly excepted to said ruling of the Court and asked that its exceptions be noted of record, which was accordingly done.

139 The Court thereupon, of its own motion, charged the jury as follows:

"Gentlemen of the Jury: In this action, which has been brought by the plaintiff against the defendant to recover $5,000 for injuries received by him while he was in the employ or service of the defendant company and which resulted in the

loss of his leg, the claim for damages made by the plaintiff is based upon two distinct causes or acts of negligence on the part of the railroad company.

"It is claimed first that the company was guilty of negligence in having the step or plate in front of the pilot of the engine insecurely fastened, so that when this plaintiff, in the discharge of his duty, stepped on it, while the train was in motion, it gave way, precipitating him to the ground, and by reason whereof he lost his leg and suffered the injury for which he has now instituted suit.

"Secondly, it is claimed that the company was guilty of negligence also in keeping the track going into the yard and on which this accident occurred in a condition whereby this accident was in part caused. The specific ground is that between the ties the track was not filled up so that when this man fell his foot was caught in it, and on account of the deep depression between the two ties he could not extricate his foot, and but for that fact he would not have lost his leg and sustained the injury for which he now sues.

"These are the two grounds of negligence which are charged against the railroad.

"The railroad company denies, first, that the step was not properly fastened. They say that the step or plate was properly fastened, and that in any event, so far as this plaintiff is concerned, he had no business on the plate.

"They also deny that they were guilty of negligence in keeping the track in the condition which it is shown to have been in, that is, that the ties were lying upon the ground and the space between the cross-ties were not filled in.

140 "They deny that under the conditions then existing, that was negligence; and they have set up as a further defense contributory negligence on the part of the plaintiff, or in other words, they say that even if it be true that the railroad company was guilty of negligence yet this accident would not have happened but for the fact that the plaintiff himself was guilty of contributory negligence, that is, such negligence which made this accident possible.

"And they set up as a cause of this plea, the fact that he had no business, while the train was in motion, to attempt to board the engine on that little narrow step in front of the engine attached to the pilot, and if he did so he did it at his own peril and at his own risk, and if by reason of stepping on it he suffered any injury, the company is not liable.

"Now, I want to explain to you, as briefly as possible, the law which is applicable to the issues which are involved. I want to state to you at the outset, gentlemen of the jury, that under our system of jurisprudence a jury is as much a part of the court as the judge is. The law divides their duties by confining to the judge exclusively the determination of all questions of law. It is the duty of the judge to tell the jury what the law is, so far as it is applicable to the case.

"On the other hand, the determination of all the facts in the case is left exclusively to the jury. Your duties and your prorogatives in determining the facts are just as great as those of the Court are in determining what the law is.

"If, at any time in my charge to you, I allude to some of the testimony which has been introduced here, I want you to remember that while I shall try not to express any opinion as to what your finding should be, yet if I should say something that might lead some of you to believe that I have a fixed opinion as to what your verdict should be or what your findings of the facts should be, I want to say to you now in advance that you are mistaken, and to any opinion which I may express on the facts you are to pay no attention, because it is you and
141 you alone who must determine the facts, and you must do it in accordance with the dictates of your conscience and in conformity with your oath to render a true and correct verdict according to the law and the evidence in the case.

"The Court has no power to interfere with you in the determination of any of the facts, and you do not have a right to interfere with the Court in determining what the law is.

"Now, I want to call your attention to the law in the case.

"The duties which a railroad company, or any other employer, because there is no difference between a railway company and any other employer, owes to its employes are quite different from those which it owes to its passengers.

("What it owes to its employes is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident.)

To the above part of the Court's charge enclosed in brackets, commencing with the words "what it owes to its employes," and ending with the words, "do not contribute to the accident," and embracing the whole of the foregoing para-

graph, all of which is enclosed in brackets, the defendant, at the proper time and in the proper manner, duly objected upon the ground that the same was not a correct statement of the employer's duty to its servant. But the Court overruled said objection, to which the defendant, at the time, saved its exceptions.

"You are, therefore, to determine from the evidence the first question raised by the plaintiff,—whether the step or plate in front of the engine and attached to the pilot, on which the plaintiff tried to step at the time of the accident, was, by reason of defendant's negligence, insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was injured as alleged while trying to get on the step in the proper discharge of his duties as a brakeman. That is the first question for you to determine, "was that plate fastened securely or not?"

"If you find from the evidence that it was properly fastened, then you need pay no more attention to that particular part of the case.

142 "But, on the other hand, if you find that it was not properly fastened, then there are other questions to be considered by you in connection with the matter.

"The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

"If under the rules either as communicated to him or as he should have known them by the exercise of due diligence, he was not permitted to get on there, yet in violation of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving away and he can not recover.

"But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act, could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by reason of having done so, then he cannot recover.

"Now, as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in

a reasonably safe condition and by reason of that failure the plaintiff, by no negligence of his own, sustained the injury complained of, then it is liable.

"Provided also that the plaintiff, at the time of the accident, did not know, or by the exercise of [reasonably] diligence could not have known, the condition of the track; but if he knew the condition of the track or could have known it by the exercise of reasonable diligence and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover.

"Now as to the duty of providing a reasonably safe place for the servant's work, the Court instructs you that when a place is in such condition as similar places under like con-
143 ditions are usually kept by well-managed railroad corporations, then the company has fully discharged its duty towards its employes and is not liable for injuries sustained by its servants, for the law conclusively presumes that when a man accepts employment which is of a dangerous nature, such as railroading, he is willing to assume the risks incident to his employment and will be entitled to no damages for injuries sustained in such employment, unless it is shown by the evidence that the employer or master was guilty of negligence by failing to provide such a safe place for the servant to perform his duties as under like conditions others engaged in the same business are in the habit of furnishing.

"Now, in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company was guilty of negligence in allowing, at that time, and that place, the track to remain with the spaces between the cross-ties unfilled whereby its servants or employes might get their foot caught and perhaps get injured.

"Now, in determining what would constitute negligence so far as this case is concerned, you are to take into consideration the place where this accident occurred. The evidence tends to show that the place where this injury occurred was a railroad yard.

("Now, as a general rule, where the tracks are in large railroad yards where there is a great deal of traffic going on and where a great many employes walk to and fro in crossing the tracks, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them.)

To the above part of the Court's charge enclosed in brackets and embracing the whole of the foregoing paragraph, the defendant objected upon the ground that the same was not a

proper statement of the law as applied to this case. But the Court overruled the said objection and the defendant at the time saved its exceptions.

"But, on the other hand, you are also to consider the fact that these yards had but recently been made, and you are to determine from the evidence that has been introduced, giving due weight to the testimony of each witness that has testified, considering, for the purpose of determining the weight to be given to his evidence, his knowledge, his interest in the matter, and his experience.

144 "Now, after you do all that, then you are to determine from that evidence whether, in view of the fact that this yard had but recently been made, it was proper or improper to leave it in the condition that the evidence shows it was in.

"It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence, not extraordinary but ordinary diligence, to have filled up this track—the spaces between the cross-ties—before the time when this accident occurred on the night of February 5th, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that they might settle the road-bed and the yards be drained, as was testified to by one of the witnesses.

"Now, as I stated to you before, gentlemen of the jury, in determining what weight should be given to the testimony of each witness, you are the sole judges of it, but I want to say to you, and I am simply expressing my own opinion, that you should consider a man's experience, his interest in the matter, and where a man has been superintendent and engaged in making yards, planning them and laying them out, his testimony is entitled to much greater weight, in my opinion, than a man who simply worked as a common laborer, or even a section boss or a boss over a few men.

"But then, as I stated to you before, you are the sole judges of the credibility of each witness and it is for you to determine which of the witnesses is entitled, where there is a conflict in the evidence, to be believed.

"Now, you are also to take into consideration whether it is usual and proper for well-managed railroads, when a new yard is laid out and has just been completed, to permit the spaces between the cross-ties to remain open for several

months, and whether it is usual to have freight trains running over the tracks into the yard in the condition that this
145 track was at the time this accident occurred.

"Now, the knowledge on the part of the plaintiff of the condition of the tracks as well as of the machinery is very important, for if an employe has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is not the kind of danger I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

"Now, if he sees that the place is dangerous, and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts, then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having filled it up, for the servant has a right to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the facts, then he must do so at his peril.

"Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or the step as the evidence shows it was in, or not.

"If he did not know it and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

"But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own experience told him he should not get on and when there was other provisions and better provisions made for a man to get on a train while it was moving, then, gentlemen of the jury, he can not recover.

"And I want to say to you that a mere custom does
146 not justify a person boarding a moving train where it is dangerous to do so; his duty is to signal the train to

stop if it is necessary for him to get on, and if he is injured by reason of trying to get on a train while in motion, and it is seen to be dangerous, he cannot recover, the law being that although the negligence of the railroad company may be the principal cause of a man's injury, yet if he was careless himself, if the want of attention to his own safety (contributed in any considerable degree to his injury), the railroad company is not liable.

To the above part of the Court's charge enclosed in brackets, "contributed in any considerable degree to his injury," the defendant at the time objected for the reason that it is not a proper statement of the law of contributory negligence as applied to this case. But the Court overruled said objection, and the defendant at the time saved its exceptions.

"An employe cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

("Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose commands he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way but that he slipped by reason of the fact that the weather was bad, and he fell and was injured and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I explained it to you a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover.)

To the above part of the Court's charge enclosed in brackets and embracing the whole of the foregoing paragraph, the defendant at the time objected on the ground that it is not a proper statement of the law as applied to this case. But the Court overruled said objection, and the defendant at the time saved its exceptions.

"But, on the other hand, if he had no business to get on that plate but his duty was to jump on the back step, or the step back of the engine which was wider and more suitable for a man to jump on, then it is immaterial whether the plate
147 in front was securely fastened or not,

"if that was the proximate cause of the injury he received, he cannot recover.

"If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact it was a new track, then the plaintiff cannot recover.

"Now, in determining whether this plate was intended to be used as a step to get on when the train is in motion, you must consider the fact that this step was but a narrow strip, that to stand on it a man's foot must be sidewise; while, on the other hand, switch-engines which run both backwards and forwards have a regular step wide enough for a man to step on, thus showing that apparently there is a distinction made by railroads between the ordinary freight engine and the switch ergine. And it is claimed by the defendant in this case that there is a difference in the duties of the employes on trains drawn by these respective engines.

"I do not know that there has been any evidence introduced on that point, gentlemen of the jury, but I want to say to you that if any evidence has been introduced tending to show that subsequent to the date of the injury the defendant either removed the plate or step from the pilot of the engine or filled in the spaces between the cross-ties, such evidence is not to be considered by you in this case as evidence that it should have been made prior thereto.

"Now, gentlemen of the jury, if your verdict is for the defendant, that is, if you believe under the charge of the Court and the evidence that has been submitted to you, that your verdict should be for the defendant, then you will simply say, "We, the jury, find for the defendant," and you need not consider anything further in this case.

"But if you think, and your verdict is that the plaintiff is entiled to recover a judgment, then, gentlemen of the jury, the next duty you have to perform is to assess the damages;
148 that is, you must determine what damages should be awarded to the plaintiff against the defendant by reason of the injury sustained by him in this accident, if the defendant is liable.

"I will state what you are to consider in assessing these damages.

"He is entitled to the expenses incurred by him in seeking to get cured; that is money expended for medical attendance and drug bills during that time.

"He is entitled to damages for his loss of time. If, on account of the accident, he was unable to perform any work, the time he could do nothing he is entitled to be compensated for. He is entitled for what you think will compensate him for the difference in what he could have earned if this accident had not occurred and what he can earn by reason of having lost his leg. The difference between these two sums he is entitled to, taking into consideration what you believe his time is worth.

"In determining the difference in wages which he may earn hereafter evidence has been introduced to show what, according to the life tables, the probabilities are as to the duration of his life hereafter. I believe the evidence introduced tended to show what his age was at the time the injury took place and the probabilities of living are 33 years and a fraction over, 33 9-10 years, at that time. Now, of course, it might be less.

"Now, gentlemen of the jury, I want to say to you that these tables are not conclusive on you, because you know that no one can say that a man is going to live a certain number of years. These tables are based on averages and the experience of men who have devoted their time to it and are thoroughly conversant in the science of making up these tables. But this is a matter for you to consider, and it is for you finally, gentlemen of the jury, to determine what you think the probabilities of his life are, that is, how long he may live.

"These are damages that can be calculated by you with mathematical precision. You can take a piece of paper
149 and a pencil and set down the proof showing that there was so much paid out for medicine and doctor's bills, I believe he testified $100.00. There was evidence tending to show that he was earning $65.00 a month and that he has been out so many months without doing anything, so you can figure that time at $65.00 a month.

"You may also figure about how long he is going to live and what he is likely to earn and what he could have earned if he had not been injured.

"But now there is one other matter of damages which is to be considered by you, about which the Court nor any one else can help you, and that is the damages that the law allows to parties that have been injured and suffered great pain, the damages allowed for the pain and suffering, both mentally and bodily.

"That is a matter, gentlemen of the jury, that you must use your own judgment about, taking into consideration a man's condition in life, his station in life, his occupation, and all

these matters, and then determining what, if he is entitled to any, damages would be a reasonable compensation for the pain which naturally a man must suffer both mentally and physically if he is injured as this man has been.

"But, of course, gentlemen, in assessing this damage you must be guided by the same rules as you will be guided in weighing other testimony, and that is this, to have no bias or prejudice for or against either party to this action.

"The fact that this man is a helpless cripple and the other party is a railroad is a question that must not, in any way, influence you when you render your verdict.

"The question which you are to decide, gentlemen of the jury, is simply not what you would like to see done but what ought to be done according to the oath which you have taken; and whatever your conscience tells you you ought to do, do that, and your verdict will be right.

"I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employes, otherwise it is liable.

150 "Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant, and was found to be in perfect condition, then if within a short time before the accident occurred—if after it left, say some central place, Forrest City or Brinkley, on its road, for some reason—or a short time before it reached here—something unknown or unforseen caused it to become loose, then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order.

"Now, then, that you are to consider.

"If you find that it has exercised due diligence such as any ordinarily reasonable man would exercise in matters of that kind, then it would not be liable.

"But, on the other hand, if they had not, and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employes' safety, regardless of his own diligence; all it under-

takes to do is to keep the machinery and its right of way and place where they work in good and proper order, and use such diligence as a prudent man and careful man would use. And the company is not liable for any defect of which an employe has knowledge at the time."

"You may now retire and consider your verdict."

151 The defendant thereupon asked the Court to instruct the jury as follows:

Defendant's Instructions.

1.

The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It it not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

152 2.

One of the contentions of the defendant in this case is that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The Court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

3.

153 You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon and was injured, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

4.

154 The Court instructs the jury that even though they should believe from the evidence that the step to the pilot was defective and dangerous and that the plaintiff was injured thereby as alleged, yet if the jury believe from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approaching engine and negligently or without ordinary care and caution attempted to step upon the foot-board in question, and in so doing slipped and was run over by the engine and injured, then the plaintiff cannot recover.

And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric head-light which blinded plaintiff, the condition of the track, the fact that plaintiff only had two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

5.

155 The Court instructs the jury that if the plaintiff knew of the condition of the foot-board in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the foot-board, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel then and there duly excepted to the ruling of the Court.

6.

156 The Court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the

place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant.

The Court refused to give said instructions and the defendant, by its counsel then and there duly excepted to the ruling of the Court.

7.

157 The Court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have such knowledge, and if after he observed, or had opportunity to observe, the defect, he was injured at said point by reason of said defect, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

8.

158 The Court instructs the jury that if the evidence in this case shows that the plaintiff had, at or before the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

9.

159 The Court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defects in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover.

The Court refused to give said instructions and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

10.

160 The Court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The Court instructs the jury that if they find from the evidence that the defendant's switch yard at the point where plaintiff was injured was in the condition alleged by the plaintiff and had been in the same condition at the time of the injury and for several months prior thereto, and that the plaintiff had been in the defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yards and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant.

And on this point, the Court instruct the jury that the master may conduct his business in his own way although such methods may be more than ordinarily hazardous, and the servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the Court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

11.

161 The Court instructs the jury that even if you find from the evidence that it was necessary for plaintiff to ride upon the steps in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

12.

162 If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from getting or stepping on the front end of engines as they approach them, and that the plaintiff attempted to step on the front end of the engine in violation of said rules and regulations, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

13.

163 If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the foot-board in question as said engine approached him, and in attempting to step upon said foot-board he slipped from said foot-board on to the track and was run over by the said engine, then he is guilty of contributory negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

14.

164 You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were entrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

165 These were all of the instructions asked, refused, and given by the Court. The jury retired and upon returning into court awarded the plaintiff a verdict for $5,000.00.

And now comes the defendant, Choctaw, Oklahoma and Gulf Railroad Company, with its bill of exceptions containing all of the evidence, instructions and exceptions saved during the trial, and tenders the same to the Court, praying that the same may be examined, approved, signed and ordered filed and made a part of the record in this case, which is now hereby done.

Witness my hand as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, this the fourth day of June, A. D. 1901.

Signed, JACOB TRIEBER,
U. S. District Judge.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

166 Which Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court, Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant and Plaintiff in Error.

Assignment of Errors.

The said defendant and plaintiff in error, the Choctaw, Oklahoma and Gulf Railroad Company, makes the following assignment of errors in the above-entitled cause:

1. The verdict of the jury is contrary to the instructions of the Court.

2. The verdict of the jury is contrary to the evidence.

3. The verdict of the jury is contrary to the evidence and the instructions of the Court.

4. The Court erred in refusing the peremptory instructions asked by the defendant, which was in words as follows: "The Court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

5. The Court erred in giving that part of its charge to the jury in words as follows: "What it owes to its employes is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in

damages for any injury sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

7. The Court erred in giving that part of its charge to the jury in words as follows: "Now, as a general rule where the tracks are in large railroad yards, where there is a great
167 deal of traffic going on, and where a great many employes walk to and fro in crossing the track, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them."

7. The Court erred in giving that part of its charge to the jury in words as follows: "Contributed in any considerable degree to his injury."

8. The Court erred in giving that part of its charge to the jury in words as follows: "Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad, and he fell and was injured, and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I explained it to you, a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover."

9. The Court erred in permitting the plaintiff to testify as follows:

Q. Do you know anything about the condition of the step before this accident occurred? Immediately before this accident, when this accident occurred, can you say just what condition it was in at that time?

Court: Do you know what condition it was in immediately afterwards?

A. I couldn't say what condition it was in.

Q. Do you know what condition it was in a short time afterward? A. A short time afterward it wasn't there.

Q. Then you don't know the condition of the step at the time of the accident?

A. I can't say what condition it was in.

168 Mr. Blackwood: Did you see it early next morning?

A. Early next next morning I went down and looked at the engine and the piece had been removed.

10. The Court erred in permitting the plaintiff to answer the following questions:

Q. Do you know what is the customary and safe way to fix yards?

A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

11. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. You were on the stand awhile ago. I will ask you when you saw this step next before this accident occurred to Tom Tennessee?

A. I seen it the last trip I was out with the engine and cautioned my brother not to try to catch on that pilot that the foot plate was loose on it.

12. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Could the inspector have found out the condition of the step if he had inspected it?

A. Yes sir.

13. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Did you see it any more after you saw it the next morning after Tom was injured?

A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

Q. Wasn't on there at all? A. No sir.

14. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Were you in the habit of doing it?

A. Yes sir, I always do it. I do it up till this day.

15. The Court erred in refusing to permit the witness A. McAvoy to answer the following question:

169 Q. Were those other yards used in the same condition as this yard was used in?

16. The Court erred in permitting the plaintiff to testify as follows:

Q. How were those yards fixed up before they were in general use?

Court: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

A. No sir, they were not allowed to go in.

Court: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed? A. Yes sir.

Court: Can you state that freight trains are not permitted to go into yards until everything is completed?

A. All that I ever seen. They would fill them in and have them ready for use until the tracks were filled in with gravel or something.

Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them? A. No sir.

Court: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

Counsel for plaintiff: You say you have had experience in helping to build at least three yards? A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Two of them were larger and one of them was about the same size.

Q. What was the difference in the ground, or soil? from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

A. No sir, it was solid dirt.

170 Q. Dirt something similar to this over here where this yard was built? A. Yes sir, I suppose so.

Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage or settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it up with gravel.

Court: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track

more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

17. The Court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury
171 happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

18. The Court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions of the defendant in this case is that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The Court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19. The Court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20. The Court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The Court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approach-

ing engine and negligently or without ordinary care and caution, attempted to step upon the foot-board in question, and in doing so slipped and was run over by the engine and injured, then the plaintiff cannot recover."

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric headlight that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

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21. The Court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The Court instructs the jury that if the plaintiff knew of the condition of the foot-board in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said foot-board, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22. The Court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant."

23. The Court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The Court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

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24. The Court erred in refusing to give defendant's instruction No. 8, in words as follows:

"The Court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25. The Court erred in refusing to give instruction No. 9, ask by the defendant, in words as follows:

"The Court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover."

26. The Court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The Court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The Court instructs the jury that if they find from the evidence that the defendant's
174 switch yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yards and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant."

"And on this point, the Court instructs the jury that the master may conduct his business in his own way although such methods may be more than ordinarily hazardous, and the

servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the Court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27. The Court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The Court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28. The Court erred in refusing to give defendant's instruction No 12, in words as follows:

"If the jury find from the evidence that the railroad
175 company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from getting or stepping on the front end of engines as they approach them and that the plaintiff attempted to step on he front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you wil find for the defendant."

29. The Court erred in refusing to give instruction No. 13, asked by the defendant, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the foot-board in question as said engine approached him, and in attempting to step upon said foot-board he slipped from said foot-board on to the track and was run over by said engine, then he was guilty of negligence and cannot recover."

30. The Court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasona-

ble care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31. The Court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the rec-
176 ord shows that the whole evidence was insufficient to support the allegations of the complaint.

Wherefore, for the reasons above cited, the defendant and plaintiff in error, prays that the judgment rendered in this case be set aside and held for naught.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for defendant and plaintiff in error.

Filed June 4, 1901. W. P. Feild, Clerk.

Which petition for writ of error and allowance thereof is in the following words and figures to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

The defendant in the above-entitled cause, the Choctaw, Oklahoma and Gulf Railroad Company, conceiving itself aggrieved by the judgment rendered therein on the 15th day of April, 1901, and the proceedings in said cause, doth hereby pray a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. W. McLOUD,
E. B. PEIRCE.
Attorneys for Defendant.

The assignment of errors having been filed with the Clerk of this Court, the writ of error to the U. S. Circuit Court
177 of Appeals for the Eighth Circuit, to review the judgment in the above-entitled cause, is granted and upon the execution of a supersedeas bond in the sum of $6,000 conditioned as required by law, execution on said judgment will be stayed.

JACOB TRIEBER,
U. S. Dist. Judge E. D. of Arkansas.

June 4, 1901.

Filed June 4th, 1901. W. P. Feild, Clerk.

Which supersedeas bond is in the words and figures following to-wit:

178 Know all men by these Presents, That we, Chas T. Abeles, S. P. Scott, are held and firmly bound unto Thomas Tennessee in full and just sum of six thousand dollars, to be paid to the said Thomas Tennessee his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 4th day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the April term A. D. 1901, of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in a suit depending in said Court between Thomas Tennessee plaintiff and Choctaw, Oklahoma and Gulf Railroad Company defendant a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company and the said Choctaw, Oklahoma and Gulf Railroad Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Tennessee citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

(Signed) CHOCTAW, OKLAHOMA & GULF RAILROAD CO.,
By E. B. PEIRCE, its atty. [Seal]
CHAS. T. ABELES, [Seal]
S. P. SCOTT, [Seal]

Approved by
JACOB TRIEBER,
U. S. Dist. Judge, East. Dist. Ark.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

179 Which citation is as follows, to wit:

180 The United States of America, to Thomas Tennessee—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber District Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this fourth day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,
United States District Judge,
For the Eastern District of Arkansas.

Service acknowledged this 4th day of June, 1901.
BLACKWOOD & WILLIAMS
& J. W. HOUSE,
Attys for defendant in error.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

181 United States of America, Western Division of the Eastern District of Arkansas.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the original remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in case of Thomas Tennessee vs. Choctaw, Oklahoma & Gulf Railroad Company.

The seal of the Circuit Court U. S. A. Western Division of East Dist. Ark.

In witness whereof, I have hereunto set my hand and the seal of said Court, this second day of July in the year of our Lord, one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-sixth.

Attest: W. P. FEILD, Clerk.

Filed Jul. 25, 1901. John D. Jordan, Clerk.

(*Appearance for Plaintiff in Error.*)

And on the twenty-ninth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter our appearance as counsel for the plaintiff in error.

J. W. McLOUD.
E. B. PEIRCE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Jul- 29, 1901, John D. Jordan, clerk. J. W. McLoud, E. B. Peirce, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the thirteenth day of September, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the defendant in error.

JOHN W. BLACKWOOD.
J. E. WILLIAMS.
J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Sep. 13, 1901. John D. Jordan, clerk. John W. Blackwood, J. E. Williams, J. W. House, counsel for def't in error.

(*Appearance for Defendant in Error.*)

And on the eighteenth day of September, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the defendant in error.

J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Sep. 18, 1901, John D. Jordan, clerk. J. W. House, counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the sixth day of January, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. B. STUART.

(Endorsed:) U. S. circuit of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma & Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Jan. 6, 1902. John D. Jordan, clerk. C. B. Stuart, counsel for pl'ff in error.

(*Order of Submission.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE.
} No. 1624.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. E. B. Peirce in behalf of the plaintiff in error; continued by Mr. J. W. House for the defendant in error and concluded by Mr. C. B. Stuart for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-fourth day of April, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CHOCTAW, OKLAHOMA & GULF Railroad Company, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.
} No. 1624. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. E. B. Peirce and Mr. Charles B. Stuart (Mr. J. W. McLoud was with them on the brief) for plaintiff in error.

Mr. J. W. House (Mr. J. E. Williams and Mr. J. W. Blackwood were with him on the brief) for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

This is an action for personal injuries which was brought by Thomas Tennessee, the defendant in error, a brakeman in the employ of the Choctaw, Oklahoma & Gulf Railroad Company, against that company. The injury complained of was sustained on February 6, 1900, at Argenta, Arkansas, near Little Rock, at which place the company had an extensive yard for parking and making up freight trains. The plaintiff below was head brakeman on a freight train of the defendant company, which arrived at this yard about ten

o'clock p. m. on the night of the accident, having come from Memphis, Tennessee. As it headed into the yard, the plaintiff descended from the engine and threw, in succession, two switches to let the train in onto the lead track and to the particular side track where it was to stand for the night. After throwing the last switch, being in front of the engine, he attempted to board the pilot of the engine for the purpose of riding down into the lower part of the yard, to see that the switches were lined up and to be in a convenient position to open or close them readily, if they were not properly lined up. In his attempt to board the pilot, he stepped on an iron step or stirrup, which was bolted to the bottom of the pilot or cow-catcher, about six or eight inches from the point thereof, when, as he claimed, the stirrup gave away and his foot went down between the ties which, at that point, were not filled in, the result being that his leg was run over and crushed and had to be amputated. He charged, as negligence on the part of the company, the defective condition of this stirrup and the fact that the track was not filled in between the ties as it ought to have been, by reason of which defect his foot was caught or wedged in under one of the ties, so that he could not extricate it. The case was submitted to the jury and there was a verdict and judgment below in favor of the plaintiff, to reverse which the defendant company sued out a writ of error.

One of the errors assigned is that the trial court refused to withdraw the case from the jury, as it was requested to do, and as this contention presents the principal question in the case, we are compelled to state the substance of the testimony which was adduced at the trial. The plaintiff's witnesses, including the plaintiff, who was one of the principal witnesses, testified to the following effect: That the proper position for a head brakeman on a freight train, when it is running into yards like the one at Argenta, is on the front of the engine, to enable him to line up the switches promptly, as they are encountered, and prevent derailments; that the pilots of freight engines are provided with foot plates or stirrups on which it is customary for the head brakeman to stand for that purpose; that the engine which he attempted to board, on the occasion of the accident, was provided with such a foot plate; that he had never received instructions not to ride on the front end of the engine, in the manner described, but, on the contrary, had often been commanded by conductors to so ride; that the only rule, on the subject, which had been prescribed by the defendant company, that he ever saw, was a rule warning its employees not to jump on or off an engine when it was running "*at a high rate of speed*"; that on the occasion of the accident the engine was moving very slowly, not more than four miles an hour; and that when the plaintiff attempted to board the engine and was hurt, he was discharging his duties in the proper and customary manner, as all other employees under like circumstances were in the habit of discharging them.

With reference to the condition of the stirrup on the pilot, the evidence elicited from the plaintiff was that "it gave way or went down" when he stepped on it and that his foot was wedged in under one of the ties (the space between the ties not being filled in), so that

he could not extricate it in time to prevent being run over; while another witness testified that this stirrup on the pilot was in a defective condition, being so loose three or four days prior to the accident, that he had at that time warned a fellow-brakeman not to step on it because of the condition it was then in. The plaintiff, testifying in his own favor, denied having any knowledge that the stirrup was out of repair and defective, before the accident occurred.

The testimony relating to the condition of the yard tracks and the plaintiff's knowledge of their condition, was to the following effect: The yard had been constructed during the months of October, November and December, 1899, and was of large dimensions, consisting of ten or twelve long tracks laid side by side, which branched off from a lead track surrounding the yard. The defendant company began to use this yard to park and make up its trains late in the month of December, 1899. On account of physical disability the plaintiff laid off and did not work for the company during the month of January, 1900, and, as he testified, had not been in this yard save on two or three occasions prior to the accident. On these occasions he was either in the yard about daylight in the morning to help take out his train, after it was made up, or when it headed into the yard about nine or ten p. m., as on the evening of the accident, on the return of the train from Memphis. He had never been on track No. 3, where he was hurt, until the evening of the accident, and he denied having any information concerning the condition of that track, prior to being injured, or any knowledge concerning the condition of the tracks generally, save such as was acquired by a casual glance on the two or three occasions aforesaid when he was in the yard or when he was passing in proximity to it on the main track and was at the time in the discharge of his ordinary duties. The spaces between the ties of track No. 3 and in the yard generally, had not been filled in with earth, although it is customary to fill in between the ties and make the surface of the ground as level as possible in depot yards where much switching is to be done. The plaintiff testified that if the track had been filled in his foot would not have been caught and that he could have extricated himself when the stirrup on the pilot gave way. On the other hand, the defendant produced evidence which tended to show that while it is customary to surface up the tracks in depot yards, by filling in between the ties, yet, as this was a new yard, it was in the condition in which newly constructed yards are usually left for some time, to permit the water to drain out.

Such being the character of the evidence that was adduced on the trial, we think that the case could not have been lawfully withdrawn from the jury without usurping its functions. The testimony manifestly tended to show that the stirrup in question had been in a defective condition for some days prior to the accident and that the defect in the stirrup was a proximate cause of the injury. Moreover, in view of its location and the use that was made of it by brakemen, the jury were doubtless warranted in finding that, in the exercise of ordinary care, the defect should have been discovered by the defendant and repaired prior to the accident. We also think

that because of the location of the track, where the accident occurred, and the use that was made of it, for switching purposes and to assemble trains, that it was the province of the jury to decide whether it was in a fit condition for the uses to which it was devoted and whether the defendant company was chargeable with any want of ordinary care or diligence in that respect. These were questions, as we think, respecting which reasonable men might entertain different opinions and such being the fact, it was the province of the jury to determine them.

Counsel urge, however, that the plaintiff ought not to have made the attempt to board the engine while it was in motion and that because he did so the trial court should have declared as a matter of law, that he was guilty of contributory negligence and could not recover. But this contention ignores important evidence, which this record contains, showing that this stirrup on the pilot was placed there for the express purpose of enabling brakemen to board the engine and stand on the pilot; that brakemen were in the habit of thus boarding engines when they were moving slowly, and standing on the stirrup; that no rule of the company, known to the plaintiff, had ever forbidden such acts prior to the accident; that the plaintiff had, at times, been ordered by conductors, under whom he worked, to place himself in that position for the purpose of lining up switches or doing other necessary acts; and that he was in the proper and customary discharge of his duties when he was injured. Under the circumstances, it was not the duty of the court to decide, as a matter of law, that the plaintiff was guilty of contributory negligence in attempting to step on the pilot of the engine when it was in motion but its obvious duty was to submit that issue to the jury, leaving them to determine, in the light of all the evidence, whether he was guilty of such an act of negligence as should preclude him from recovering. The placing of this stirrup on the engine was an invitation to brakemen to stand thereon. It was placed there for that purpose, as the defendant company concedes; while its rule warning employees against jumping on engines when moving at "a high rate of speed" impliedly permitted them to do so when they were moving slowly. Besides, if the testimony of the plaintiff is credited, it was his duty to stand on this foot plate as the train moved slowly down into the yard, to observe the condition of switches and be in a position to close them promptly and prevent a derailment, if any were found open.

Counsel for the defendant company have called our attention to a number of well-known cases in support of their contention that the plaintiff was guilty of contributory negligence in attempting to get on the pilot with a view of riding thereon, when the train was moving, but we think that the case in hand is distinguishable therefrom by the facts and circumstances to which we have alluded, and that if the plaintiff might have been found guilty of contributory negligence, it was, in this instance, the province of the jury, rather than the duty of the court, to make that finding.

We conclude, therefore, that no error was committed by the trial court in submitting the case to the jury.

The charge of the lower court is criticized because in one or two places the language which was employed, when considered by itself, might be understood to mean that a master is bound at all events to furnish machinery etc., which is reasonably safe, whereas the law is that he is only required to exercise reasonable and ordinary diligence in that behalf, the duty not being imperative or absolute. For example, the court said, in one place, "the duty which a railroad company * * * owes to its employees is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work." It neglected to say that it is the duty of a railroad company to exercise reasonable care in the matter of providing machinery. Whatever error there may have been, in these respects, was cured, we think, by other portions of the charge, particularly by the concluding paragraphs thereof, where the court clearly specified the degree and kind of diligence which the defendant company ought to have exercised in providing machinery and appliances, telling the jury, in substance, with respect to the stirrup, which was the only appliance complained of, that if it had been inspected at proper and suitable times, by the defendant, and was found to be in good condition, and that if it had become loose, for some unforeseen or unknown cause, shortly before the plaintiff was hurt, that the defendant could not be found guilty of negligence, because of the defect in the stirrup, since in that event it would have exercised due diligence. In the same connection, the jury were instructed, in substance, that if the stirrup had become loose so long prior to the accident that, by the exercise of reasonable or ordinary diligence, the defendant could have discovered it and repaired it, then and in that event it might be deemed guilty of negligence. The jury were also instructed that the master is not the insurer of his servants' safety and that all he undertakes to do is to keep the machinery, which he uses, in proper order and repair and to use such diligence in that behalf as a prudent and careful man would use. The rule, as heretofore declared by this and other courts, being that a judgment will not be reversed on account of the failure to use some qualifying word or phrase in some clause of the charge, when the charge, considered as a whole, states the law applicable to the case correctly (*Western Coal & Mining Co., v. Ingraham*, 17 C. C. A. 71, 70 Fed. Rep. 219; *Portland Gold Mining Co. v. Flaherty*, — C. C. A. —, 111 Fed. Rep. 312; *Third Ave. R'y Co., v. Krausz*, — C. C. A. —, 112 Fed. Rep. 379) it follows that the error above mentioned, in view of what was said in other parts of the charge, cannot be regarded as a material error, such as would warrant a reversal.

Complaint is also made because the lower court charged the jury, in substance that in large railroad yards where there is much traffic and many employees, a railroad company is required to exercise more diligence and keep its tracks in better condition than it would out in the country, but we have been unable to discover any material error in this instruction. The court obviously meant that in railroad yards, where trains are made up and much switching and coupling is done, railroad companies ought to exercise greater care,

in keeping the space between its ties filled up and the ground level and free from obstructions or pitfalls, than in other places along its line, where there is less occasion to make couplings. As thus understood—and the instruction is not fairly susceptible of a different interpretation, as applied to the facts of this case—it was correct.

In another part of the charge the lower court said, concerning the plaintiff, "if he was careless himself, if the want of attention to his own safety contributed *in any considerable degree to his injury*, the railroad company is not liable;" and this statement of the law forms the subject-matter of another exception, which would have been tenable were it not for the fact that the court, in the same connection, specified the particular acts which would amount to contributory negligence, and preclude the plaintiff from recovering, telling the jury, in substance, that an employee cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which said exposure contributed; that "if the plaintiff had no business to get on that foot plate (meaning, of course, the stirrup which gave way), but his duty was to jump on the back step or the step back of the engine, which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not." We are of opinion that this statement, by the trial judge, sufficiently advised the jury of the nature of the acts, which if committed by the plaintiff would amount to contributory negligence—to prevent the instruction, which is criticized, from misleading the jury and to deprive the exception, which is now under consideration, of any merit.

In the course of the trial a witness for the plaintiff, who had testified that the step on the pilot was loose three or four days before the accident, and that he had warned one of his fellow-brakemen not to step on it, was asked whether he saw the step the morning after the accident and he replied that he went down the next morning and looked at the engine and the piece had been removed. The defendant company objected to the latter part of this answer on the general ground that it was "incompetent, irrelevant and immaterial to any issue in the case" and an exception was saved. It is manifest, we think, that this question was not asked by counsel for the plaintiff with a view of showing that the alleged defect was repaired by the master after the accident had occurred, which class of testimony is generally inadmissible. Counsel obviously had no such purpose in view. The witness was asked if he saw the step the morning after the accident, evidently with a view of inquiring further what condition it was then in and he replied casually that the morning after the accident it had been removed, which may have meant that it was torn off when the plaintiff stepped on it and was not on the pilot the next morning. Besides, the court instructed the jury that if any evidence had been introduced showing that subsequent to the accident the defendant repaired the step on the pilot or filled in the spaces between the ties, that such testimony should not be considered by the jury, as any evidence that such action should have been

taken before the accident occurred. It is clear, therefore, that the exception last specified is of no moment and should be disregarded.

Several other exceptions were taken during the trial and are embraced in the assignment of errors, all of which have been considered and found to be without merit. Most of these exceptions have not been argued by counsel but our attention has simply been directed to them in the brief. The case seems to have been fairly and thoroughly tried. The instructions, in all material respects, were as favorable to the defendant as could have been desired, except that the court declined to withdraw the case from the jury, holding that there were issues of fact in the case which ought to be determined by the jury, and in this respect its action was right. The judgment below is accordingly

Affirmed.

SANBORN, *Circuit Judge*, dissenting:

The alleged causes of action in this case were the failure of the railroad company to exercise ordinary care to properly ballast its tracks and to inspect and keep the step on the bottom of the cowcatcher in repair. In regard to these subjects the court below instructed the jury in three different places in its charge that the law imposed upon the railroad company the absolute duty to furnish its employés a reasonably safe place to work and reasonably safe machinery with which to discharge their duties. These three declarations, one of which was delivered early in the charge, one when the court had delivered about one-third of it, and the last near its close, read in this way:

1. "What it owes to its employés is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

2. "Now as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in a reasonably safe condition and by reason of that failure the plaintiff, by no negligence of his own, sustained the injury complained of, then it is liable."

3. "I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employés, otherwise it is liable."

Here were three erroneous declarations of the law controlling the rights of the parties in this litigation. They were not trivial and inadvertent mistakes in the use of words or terms, but solemn and thoughtful declarations of the rule of law which the court clearly intended should control, and which doubtless did govern the jury in its deliberations.

That they were erroneous the following authorities demonstrate: *Choc., Okla. & Gulf R. R. Co., v. Holloway*, — Fed. —; *Railway Co., v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Har-*

ley, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co., v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *St. Louis, I. M. & S. R'y Co., v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Louisville & N. R. Co., v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co., v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *id.* 22 C. C. A. 269; 76 Fed. 443.

The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal, is applicable. *Choc., Okla. & Gulf R. R. Co., v. Holloway*, — Fed. —; *National Masonic Acc. Ass'n v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Atchison, T. & S. F. R'y Co., v. McClurg*, 8 C. C. A. 322, 325–'6, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807–'8; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Moores v. Bank*, 104 U. S. 625, 630; *Gilmer v. Higley*, 110 U. S. 47, 50; *Vicksburg & Meridian Railroad Co., v. O'Brien*, 119 U. S. 99, 103; *Mexia v. Oliver*, 148 U. S. 644, 673; *Boston & Albany Railroad Co., v. O'Reiley*, 158 U. S. 334, 337; *Peck v. Heurick*, 167 U. S. 624, 629.

It is true that while the court gave the erroneous rule of law to the jury three times at three different places in its charge, it also gave the true rule once. But this neither extracted the error nor proved that this error could not have prejudiced the railroad company. The presumption, as we have seen, is that this error of law did produce prejudice unless the contrary clearly appears beyond doubt. It cannot so appear either beyond doubt or by a preponderance of evidence where the court repeats the error twice and gives the true rule but once. Where two contradictory rules are given to the jury by the charge of the court for their guidance in determining the crucial issues of a controversy, as in the case at bar, it is impossible for an appellate court to ascertain or to know by which the jury were governed in their decision of the issues and the presumption that error produces prejudice must prevail. The vice of a wrong rule is not extracted by giving a right rule, because it is impossible to tell which influenced the jury. *St. Louis, I. M. & S. R'y Co. v. Needham*, 52 Fed. 371, 377, 3 C. C. A. 129, 147; *St. Louis & S. F. R'y Co. v. Farr*, 6 C. C. A. 211, 216, 217, 56 Fed. 994, 1000.

There was another error in the charge. It consisted in the instruction that the negligence of the plaintiff was a bar to his recovery if that negligence contributed in any considerable degree to his injury when the law was that it constituted a bar if it contributed in any degree. On account of these palpable errors in the charge of the court the judgment below should be reversed and a new trial should be directed.

Filed April 24, 1902.

(*Judgment.*)

And on the twenty-fourth day of April, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

THURSDAY, *April* 24, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Thomas Tennessee have and recover against the Choctaw, Oklahoma and Gulf Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

April 24, 1902.

(*Petition for Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.

Petition for writ of error.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner respectfully shows that it is a corporation organized under an act of the Congress of the United States, entitled, "An act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that company," which was approved August 24th, 1894, and the acts supplemental thereto, approved on April 24th, 1896, entitled, "An act to amend an act approved August 24th, 1894, entitled, 'An act to authorize the purchasers,'" etc., and the act approved March 28th, 1900, entitled, "An act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company;" that by the judgment

heretofore rendered by the said United States circuit court of appeals for the eighth circuit, in the above-entitled cause, manifest error has happened, to the great damage of your petitioner, in this: That a great and manifest error at law occur-ed at the trial of the said cause against the objection of your petitioner, and to its great damage, all of which will more fully appear by the record of said court in said cause.

Your petitioner further shows that this is not a case in which the jurisdiction is dependent upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States, nor a case arising under the patent laws, or under the revenue laws, or under the criminal laws, nor an admiralty case; and that the matter in controversy exceeds one thousand dollars besides costs.

Wherefore, your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States to be directed to the said United States circuit court of appeals for the eighth circuit, whereby, under the seal of said United States circuit court of appeals for the eighth circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with the writ of error, and that the record and proceedings aforesaid being inspected, the Supreme Court of the United States will cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Petition for writ of error. Filed May 26, 1902, John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.

Know all men by these presents—that we, Choctaw, Oklahoma and Gulf Railroad Company, as principal, and Allen N. Johnson and Chas. F. Penzel, as sureties, are held and firmly bound unto the defendant in error, Thomas Tennessee, in the full and just sum of

eight thousand ($8000.00) dollars, to be paid to the said defendant in error, Thomas Tennessee, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the — day of May, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of appeals of the United States for the eighth circuit, in a suit depending in said court, between Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, and Thomas Tennessee, defendant in error, a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma and Gulf Railroad Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Tennessee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof,

Now, the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY,
By J. W. McLOUD, *General Solicitor.* [SEAL.]
ALLEN N. JOHNSON. [SEAL.]
CHAS. F. PENZEL. [SEAL.]

Sealed and delivered in presence of—
E. B. PEIRCE.

Approved by:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

May 23, 1902.

This bond is good & acceptable to defendant in error.
BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Att'ys for Def't in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Bond. Filed May 26, 1902, John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-sixth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

Q. Could the inspector have found out the condition of the step if he had inspected it?

A. Yes sir.

13. The court erred in permitting the witness Wesley Graves to testify as follows:

Q. Did you see it any more after you saw it the next morning after Tom was injured?

A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

Q. Wasn't on there at all?

A. No sir.

14. The court erred in permitting the witness Wesley Graves to testify as follows:

Q. Were you in the habit of doing it?

A. Yes sir, I always do it. I do it up till this day.

15. The court erred in refusing to permit the witness A. McAvoy to answer the following question:

Q. Were those other yards used in the same condition as this yard was used in?

16. The court erred in permitting the plaintiff to testify as follows:

Q. How were those yards fixed up before they were in general use?

COURT: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

A. No sir, they were not allowed to go in.

COURT: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed?

A. Yes sir.

COURT: Can you state that freight trains are not permitted to go into yards until everything is completed?

A. All that I ever seen. They would fill them in and have them ready for use until the tracks were filled in with gravel or something.

COURT: State in what manner you helped. Did you superintend the building of them, laying them out and planning them?

A. No sir.

COURT: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

COUNSEL FOR PLAINTIFF: You say you have had experience in helping to build at least three yards?

A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Two of them were larger and one of them was about the same size.

Q. What was the difference in the ground, or soil? from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

A. No sir, it was solid dirt.

Q. Dirt something similar to this over here where this yard was built?

A. Yes sir, I suppose so.

Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage of settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it up with gravel.

COURT: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

17. The court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

18. The court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions of the defendant in this case is, that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is, that the step was in a sound condition and perfectly safe. The court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason

of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19. The court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20. The court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary case and caution got upon defendant's track, or on the side thereof, in front of the approaching engine, and negligently or without ordinary care and caution, attempted to step upon the footboard in question, and in doing so slipped, and was run over by the engine and injured, then the plaintiff cannot recover."

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric head-light that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

21. The court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The court instructs the jury that if the plaintiff knew of the condition of the footboard in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said footboard, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occur-ence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22. The court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant."

23. The court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The court instructs the jury that the plaintiff was bound to

notice the defect in the track of which he complains *if*, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

24. The court erred in refusing to give defendant's instruction No. 8, in words as follows:—

"The court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25. The court erred in refusing to give instruction No. 9, asked by the defendant, in words as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, the plaintiff was guilty of contributory negligence and cannot recover."

26. The court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch-yard had not been filled in and that they were standing some fifteen inches above ground. The court instructs the jury that if they find from the evidence that the defendant's switch-yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch-yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch-yard and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant."

"And on this point, the court instructs the jury that the master may conduct his business in his own way, although such methods may be more than ordinarily hazardous, and the servant assumes

the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27. The court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28. The court erred in refusing to give defendant's instruction No. 12, in words as follows:

"If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakeman, which warns and prohibits them from getting or stepping on the front end of engines as they approach them and that the plaintiff attempted to step on the front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant."

29. The court erred in refusing to give instruction No. 13, asked by the defendant, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the footboard in question as said engine approached him, and in attempting to step upon said footboard he slipped from said footboard onto the track and was run over by said engine, then he was guilty of contributory negligence and cannot recover."

30. The court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31. The court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the record shows that the whole evidence was insufficient to support the allegations of the complaint.

Third. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the western division of the eastern district of Arkansas to said circuit court of appeals, erred in making its order affirming the judgment of said circuit court of the United States, and directing a mandate to issue to the circuit court of the United States for the western division of the eastern district of Arkansas, directing the said circuit court of the United States to proceed in accordance with the decision and order of said circuit court of appeals.

Fourth. That the said circuit court of appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said circuit court of the United States and in not directing a new trial of the issues raised by the pleadings in said action; and the said Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court of appeals and in the circuit court of the United States for the western division of the eastern district of Arkansas, and the order entered herein as aforesaid by the circuit court of appeals, and the judgment of affirmance to be entered in the said circuit court of the United States for the western division of the eastern district of Arkansas upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment and order.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Assignment of errors. Filed May 26, 1902, John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, and Thomas

Tennessee, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Writ of error. Filed May 26 1902 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this thirty-first day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the twenty-eighth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the acceptance of service endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

To Thomas Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of the within citation this the 27th day of May, 1902.

BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Counsel for Defendant in Error.

[Endorsed:] No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Citation. Filed May 28, 1902. John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred fifty-five pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Thomas Tennessee was defendant in error, No. 1624, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of

service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

I do further certify that a copy of the writ of error is lodged in my office for the use of the defendant in error.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this thirty-first day of May, A. D. 1902.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18579. U. S. C. C. of appeals, 8th circuit. Term No. 351. The Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Filed June 10, 1902.